This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

**Usage guidelines**

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

+ *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.

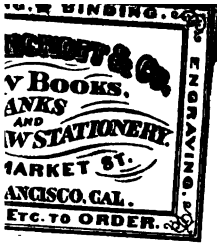
+ *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.

+ *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.

+ *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

**About Google Book Search**

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at `http://books.google.com/`




Young & Sawyer

January 23rd 1877

# POLITICAL

AND

# CONSTITUTIONAL LAW

OF THE

# UNITED STATES OF AMERICA

BY

WILLIAM O. BATEMAN

COUNSELLOR-AT-LAW.

'ETERNAL VIGILANCE IS THE PRICE OF LIBERTY.'

ANDREW JACKSON.

*'The Constitution, in all its provisions, looks to an indestructible Union composed of indestructible States.'*—Opinion of the Supreme Court of the United States in Texas *v.* White, 7 Wall. 721.

ST. LOUIS

G. I. JONES AND COMPANY

1876

LIBRARY OF THE
LELAND STANFORD JR. UNIVERSITY
LAW DEPARTMENT

57,338

Copyright, 1876
by
G. I. JONES AND COMPANY

ST. LOUIS
PRESS OF G. I. JONES AND COMPANY

TO

EVERY AMERICAN CITIZEN

WHO PREFERS THE GLORY OF HIS COUNTRY,

A CONSTITUTIONAL GOVERNMENT

AND

'AN INDESTRUCTIBLE UNION OF INDESTRUCTIBLE STATES,'

TO

THE SYSTEM OF POLITICAL USURPATION

AND

OFFICIAL CORRUPTION

NOW FORESHADOWING THE COMING

EMPIRE,

THIS WORK IS

*DEDICATED.*

# PREFACE.

The design of this work is to point out the way to a just appreciation of the American political system.

The PRINCIPLES fundamental to political self-government, should doubtless be clearly understood by every VOTER or ELECTOR. For his *status*, in this country, is no less than that of one of a body of absolute sovereigns.[1] The three fundamentally different and mutually opposing theories of our political system,—one or another of which every voter must necessarily sanction, and consequently, one or another of which must furnish the key to every administration of government, state and federal,—are therefore severally and distinctly presented, so that every voter may judge for himself, as he ought to do, which of these theories should receive his assent and support.

Attention is also directed to the different foundations of government, to the rise and development of the system peculiar to America, to the sovereign legislation by the People themselves from the dawn of the Revolution to the XVth Amendment, and to the views and doctrines of the original framers of our Constitutions; ever so little reflection upon which will enable any voter to form his own independent opinion, regardless of partisan strifes, and to cast his vote with a clear understanding of what it involves.

The principle of the XIVth and XVth Amendments to the national Constitution,—the principle of *partisan* changes of the fundamental organic law, affecting the paramount sovereignty of the People,—is reviewed in the light of principles deemed sacred by the fathers of our republic, and the conclusion unavoidably reached, that one more step, if sanctioned by the People, will wholly divest

[1] On the responsibility resting with electors or voters, see § 97 of this work.

them of their sovereign right of suffrage and election—the sceptre of their sovereignty and their proudest inheritance—and clothe their common government with an imperial and despotic power. That step is now foreshadowed as a probable XVIth or XVIIth Amendment, in substance this:—The right of citizens of the United States, to vote, shall be protected by the United States, and by congressional legislation prescribing the right to vote and the qualifications requisite to the exercise thereof. The proposition that THE UNITED STATES ARE A NATION may be the form of the new Amendment. For the power of congress to regulate all matters which may in any way affect the NATION, has been already deduced from this proposition by some of our political writers. In this connection, it should be remembered, that Amendments to the Constitution of the United States, DISPOSING OF THE PARAMOUNT SOVEREIGNTY OF THE PEOPLE PURSUANT TO THE CAPRICE OF THE DOMINANT PARTY IN CONGRESS, are no longer submitted to the People themselves, for adoption or rejection, but only to the State legislatures! If the Constitution of the United States is thus at the mercy of any administration that may come into power under it, there is plainly an end of Constitutional Government in America. The subject bespeaks its own importance; an importance outweighing all other political considerations.

While the issues of the late war are now universally regarded as forever decided and set at rest, the People are yet to determine and decide, by their votes at the coming elections, whether they will or will not continue to exist as they have always existed,—that is, as self-governing States, each State being a separate body of electors or voters, and each body of electors or voters making and controlling their own election law by their State Constitution;—or whether the sceptre of their paramount sovereignty, their power to govern by holding the right of suffrage and election at their own sovereign will, shall pass from them to a congress which must thereby become an irresponsible and despotic power.[1]

This question is ever before the People, whether they, or their Government, shall be Sovereign. For political government is of

[1] See § 96, pp. 163–164. See also §§ 171 to 181.

such a nature as to keep this question forever alive so long as the decision of the People is in their own favor. This very same question was the first to be decided in 1776. It is now the first to be decided in 1876.

WM. O. BATEMAN.

ST. LOUIS, 1876.

# ORDER AND DIVISION OF SUBJECTS.

(For Index, see End of Volume.)

---


| | Sec. |
|---|---|
| INTRODUCTORY | 1 |
| (1 *a*) POSITIVE RIGHTS | 4 |
| (1 *b*) PUBLIC | 5 |
| (1 *c*) INTERNAL OR ABSOLUTE—viz. | 6 |
| (1 *d*) POLITICAL EXISTENCE—wherein | 7 |
| (1 *e*) Of the General Nature of a Political State— | 7 |
| The Country and Title thereto | 8 |
| The People | 9 |
| The Government | 10 |
| Analysis of the Foundations of Government | 11 |
| Government based on Common Consent | 11 |
| Sovereignty of People ceded to their Rulers | 12 |
| Sovereignty of People wholly reserved to themselves | 13 |
| Sovereignty of People partly ceded and partly reserved | 14 |
| Individual Liberty | 14 |
| State Sovereignty | 15 |
| States United | 16 |
| Inalienable Rights | 16–17 |
| Common Consent as implied | 17 |
| Definitions of a nation or state | 18 |
| Blackstone's idea | 18 |
| General Descriptions of a State | 18 *a* |
| What is meant in this country by a State | 19 |
| What the United States | 19 |
| Distinction between Nation and State | 20 |
| Duty of political self-preservation | 21 |
| (2 *e*) Of the Political State of the ANGLO-AMERICAN COLONIES | 22 |
| Their rapid rise | 22 |
| Their political dependence | 23 |
| Different kinds of Colonial Governments | 24 |
| Royal | 25 |
| Proprietary | 26 |
| Chartered | 27 |
| Internal divisions of the Colonies | 28 |

Their relations to each other and to the parent State - - 29
Their common allegiance - - - - - - - - - 30
Jealous of their Liberties - - - - - - - - - 31
The issue between them and the parent State - - - 32
The Stamp Act - - - - - - - - - - - 33
Opposition thereto - - - - - - - - - 34
The Congress of 1765 - - - - - - - - - 35
Omnipotence of Parliament asserted in England - - 36
The Congress of 1774 - - - - - - - - - 37
(3 *e*) Of the Political Measures of the Revolution - - 38
and herein
(1 *f*) Of the Resumption of the Political Sovereignty by the
People - - - - - - - - - - - - 38
Right of Revolution - - - - - - - - - 38
The Sovereignty resumable in three ways - - - - - 39
In what way and by whom it was resumed - - - 40
Action of the people of Massachusetts - - - - 41
Action of the people of New Jersey - - - - 42
Action of the people of the other States - - - - 43
(2 *f*) Of the General Congress of the Revolution - - 45
Composition and character of this Congress - - - 45
Its powers - - - - - - - - - - 46
Its early measures - - - - - - - - - 47
Declaration of Independence - - - - - - - 48
Operative clause of this act - - - - - - 49
Confederation of the States - - - - - - - 50
The Articles of Confederation - - - - - - 50
Treaty of Peace - - - - - - - - - 51
(3 *f*) Of the Principles Established by the Revolution - 52
Political Principles - - - - - - - - 52
The Right of Revolution - - - - - - - - 52
State Sovereignty - - - - - - - - - 54
Allegiance - - - - - - - - - - 55
The original Union of the States - - - - - 56
Defects of the Confederation - - - - - 57
Common Law Principles - - - - - - - 59
General nature of the Common Law - - - - - 59
Its confirmation partial - - - - - - - 60
By and for whom confirmed - - - - - - 61
Its peculiar genius and excellence - - - - 62
(2 *d*) POLITICAL SOVEREIGNTY—comprehending - - - 69
(1 *e a*) The Legislative Power—which is of three kinds, viz.
(1 *f a*) The Legislative Power of the People
(The Original Principle of Sovereignty) - - - 69
and herein - - - - - - - - - 71
(1 *g a*) Of the Establishment of the State Constitutions - 73
General nature of these instruments - - - - 73

Their foundations - - - - - - - - - 74
General form of State Constitution - - - - - 75
(2 *g a*) Of the establishment of the Constitution of the United States—and herein
(1 *h*) Of the General Convention of 1787
Action resulting in the call therefor - - - 76
Action of the Annapolis Convention - - - - 77
Action of Congress - - - - - - - - 78
Responses of the States - - - - - - - 79
Two parties in the Convention - - - - - 80
Final action of the Convention - - - - - 81
The Constitution as submitted - - - - 81
Resolution and Letter of the Convention - - - 83
Action of Congress thereon - - - - - 84
(2 *h*) Of the Ratifying Conventions of the States and their Ordinances of Ratification - - - - - - 85
Delaware Ordinance - - - - - - - 85 *a*
Pennsylvania Ordinance - - - - - - - 85 *b*
New Jersey Ordinance - - - - - - - 85 *c*
Georgia Ordinance - - - - - - - - 85 *d*
Connecticut Ordinance - - - - - - - 85 *e*
Massachusetts Ordinance - - - - - - - 85 *f*
Maryland Ordinance - - - - - - - 85 *g*
South Carolina Ordinance - - - - - - 85 *h*
New Hampshire Ordinance - - - - 85 *i*
Virginia Ordinance - - - - - - - - 85 *k*
New York Ordinance - - - - - - - 85 *l*
North Carolina Ordinance - - - - - - - 85 *m*
Rhode Island Ordinance - - - - - - - 85 *n*
Resolution of Congress - - - - - - - 85 *o*
Inauguration of U. S. Government - - - 86
(3 *h*) Of the Power to Amend and the several Amendments - - - - - - - - - - - 86 *a*
Mode of Establishing Original Reviewed - - 86 *a*
Mode of Amendment - - - - - - - - 87
Impolicy of Amendments - - - - - - 88
The Several Amendments now Established - - 89
(3 *g a*) Of the Political System Established by the Organic Law—and herein - - - - - - - - - 90
(1 *h a*) Of the States as Bodies Politic or 'The People' as Electors - - - - - - - - - - 90
Who compose the Political States - - - - 91
Who 'The People' are - - - - - - - - 92
'The People' Sovereign - - - - - - - 93
Importance of Regulations concerning Electors - - 95
Variety of such Regulations - - - - - 96
Office of Electors - - - - - - - - - 97

Suffrage, necessarily Limited - - - - - 91, 98
Extension of, the Ruin of Republics - - - - 99
Possible Remedy for Evils - - - - - 100
(2 *h a*) Of the Character of the Union - - - - 101
The Primary Question - - - - - - 101
The Imperial or 'National' Theory - - - - 102
Method and Object of - - - - - - 103
Parties to the Constitution - - - - - 104
Competency of, how determined - - - 105
Advantages of this Theory - - - - - 106
An easy method of Usurpation - - - - 107
Preamble to Constitution - - - - - - 108
How it originally stood and why changed - 109
The Federal Theory - - - - - - - - 111
Principle that governed the Convention - - 112
Design of the Convention - - - - - 113
Madison's View - - - - - - - - 114
Of Foundation of Federal Government - - 114
Sources of Federal powers - - - - 115
Operation of Federal powers - - - - 116
Extent of Federal powers - - - - 116
Hamilton's View - - - - - - - - 118
U. S. a Confederacy - - - - - 119
Advantages of a Confederacy - - - - 121
Legislation for States condemned - - - 122
Coercion of States impracticable - - - - 123
Encroachments by States - - - - - 124
Bounds of State and Federal authority - - 125
Alienation of State Sovereignty in three cases only 126
Rule of Constitutional Interpretation - - 127
Parties to Constitution - - - - - - 128
Jay's View - - - - - - - - - 130
Chief Justice Marshall's position - - (§ 204) 131
Webster's doctrine - - - - - - - 133
State Sovereignty - - - - - - - - 134
As Internal, inalienable - - - - - 135
A check to tyranny of majorities - - - - 136
May the Union be dissolved - - - - - 137
Right to Resume the Powers of Government - - 138
Principles of the Union - - - - - - 141
Construction of Federal powers - - - - 142
Supremacy of Federal laws - - - - 143
Extent of Federal powers - - - - - 145
Final Judgment on Political issues - - - 146
Political Parties - - - - - - - - 151
Origin of - - - - - - - - - 152
Necessity of - - - - - - - - - 153

(3 *h a*) Of Citizenship - - - - - - - - 155
What is meant by 'citizen' - - - - - - 155
Three kinds of 'states' - - - - - - - 156
Native Citizens - - - - - - - - - - 157
Naturalized Aliens - - - - - - - - - 158
Power of Naturalization - - - - - - - 159
Character and extent of - - - - - - 161
Legislation under - - - - - - - - 162
Naturalization by operation of law - - - - - 166
Duties and Rights of Citizens - - - - - - 167
In General - - - - - - - - - - 167
Citizens of the U. S. - - - - - - - 168
Origin of U. S. Citizenship - - - - - 169
'Privileges and Immunities' of - - - - 170
The xvth Amendment - - - - - - 171
Allegiance and Protection - - - - - - 180
Twofold character of - - - - - - - 181
(Two Governments for each State) - - - 181
Obligation of human laws - - - - - - 182
Expatriation - - - - - - - - - - 183
(2 *f a*) The Legislative Power of the State Legislatures - 186
(1 *g b*) Constitution of these Bodies - - - - - - 186
Policy of dividing them - - - - - - - 186
House of Representatives - - - - - - - 187
Senate - - - - - - - - - - - - 188
Powers of each House, Privileges of Members, etc. - 189
(2 *g b*) Nature and Extent of their Powers - - - 190
General, not enumerated - - - - - - - 190
Certain Powers Prohibited - - - - - - 191
Contrasted with powers of the British Parliament - 192
The vice of our system - - - - - - - 193
(3 *f a*) The Legislative Power of Congress - - - - - 194
(1 *g c*) Constitution of Congress - - - - - - 194
Division into two Branches - - - - - - - 194
House of Representatives - - - - - - - 195
Apportionment of Representatives - - - - 196
Senate - - - - - - - - - - - - 197
States Represented - - - - - - - - 198
Qualifications and appointment of Senators - - 198
Powers of each House—Privileges, etc. - - - - - 200
(2 *g c*) Nature and Extent of the Powers of Congress - 201
Its Powers Enumerated - - - - - - - - 201
Object of their Enumeration - - - - - - 202
Limitations of its Powers - - - - - - - 203
The Taxing Power - - - - - - - - - 205
Purpose of this Power - - - - - - - - 206
Rules controlling it - - - - - - - - 207

Relation of Federal and State Taxation - - - 211
The Power to Regulate Commerce - - - - - 215
As to Bankrupt Laws - - - - - - - - 225
As to Post-offices and Post-roads - - - - 227
As to Patents and Copyright - - - - - 228
As to Offences on the High Seas - - - - 229
War Powersof Congress - - - - - - - 231
As to Army - - - - - - - - - - 235
Navy - - - - - - - - - - - 237
Militia - - - - - - - - - - 239
The State's Defence - - - - - - - 241
Over Places ceded to U. S. - - - - 244
Concerning Treason - - - - - - - 247
To admit new States - - - - - - 248
As to Territory and other Property of U. S. - 249
As to Guaranty of Republican Government - 250
(2 *e a*) The Judicial Power - - - - - - - - 253
(1 *f b*) The Judicial Power of the People - - - 253
(2 *f b*) The Judicial Power of State Courts - - - - 255
(1 *g d*) General Nature and Extent of - - - - 255
(2 *g d*) The several kinds of State Courts - - - - 261
(3 *f b*) The Judicial Power of Federal Courts - - - 266
(1 *g e*) Its Extent - - - - - - - - - 266
(2 *g e*) The several U. S. Courts - - - - - 272
Supreme Court - - - - - - - - - 278
Inferior Courts - - - - - - - - - 280
District Courts - - - - - - - - - 280
U. S. Circuit Courts - - - - - - - 281
(3 *e a*) The Executive Power - - - - - - - - 283
(1 *f c*) State Governors - - - - - - - - 283
(2 *f c*) President of the U. S. - - - - - - - 286
(1 *g f*) Mode of Electing - - - - - 286
(2 *g f*) Qualifications for the Office - - - - - 288
(3 *g f*) Power of - - - - - - - - - 289
As Commander-in-chief - - - - - - - - 290
of Army and Navy - - - - - - - 290
of Militia - - - - - - - - - - 291
To grant reprieves and pardons - - - - - 293
Concerning Treaties - - - - - - - - 294
To appoint U. S. Officers - - - - - - - 295
To convene and adjourn Congress, etc. - - - - 296
To Veto Bills - - - - - - - - - 297
(3 *d*) POLITICAL DOMAIN - - - - - - - - - 300
Domain of the States - - - - - - - - - 300
Domain of the United States - - - - - - - - 302
CONCLUSION - - - - - - - - - - - - - 308

# POLITICAL AND CONSTITUTIONAL LAW

OF THE

# UNITED STATES

## INTRODUCTORY.

§ 1. Relation of natural to positive law.

In order to determine at what point of our inquiry we ought to commence, a preliminary observation of things presupposed may not be uncalled for.

The political or fundamental law of a people, considered in relation to its original principles, is, as all will admit, a more or less perfect recognition and expression of the so-called natural law; a particular system of political ethics, which they have drawn from the original fountain of ethics, and thence ordained and established as the positive rule of their conduct in relation to each other. The principal difference between the natural and the positive laws of human society, is seen in the different methods by which those laws are prescribed. Human nature is their common source. Both are prescribed by man to man: the first, by any and every individual as his opinion of natural right; the last, by the common authority, as the COMMON SENSE OF THE COMMUNITY AT LARGE.

The right of self-government is the right of one people no more than of another, and it follows of course that every system of positive law should be everywhere respected, and in fact received and considered, as the original idea of justice particularly defined and applied by the wisdom and experience of the people by and for whom ordained and established; in other words, as the common sense and moral philosophy of that particular people, expressed and proclaimed by them as the law of their political state. And this is the reason of that friendly and mutual respect which the laws, the governments and the courts of civilized nations show for each other.

§ 2. The necessity of positive laws.

If the principles of natural justice were everywhere well understood, and men could be just to themselves, the institution of political states and positive laws would be wholly unnecessary and unwarranted. But even if men were naturally inclined to be just, yet positive laws would be still indispensable, in order to quiet those doubts and disputes which must otherwise constantly arise concerning the duties enjoined and the rights conferred by natural law. For what is or is not conformable to that law, is a question upon which the minds of mankind are oftener divided than agreed, and one that can only be settled by that legitimate expression of the common understanding and agreement of society which constitutes positive law, and which in fact is the only criterion or standard of right to which human government can justly permit an appeal.

Positive law defined.

This positive, civil or municipal law, is therefore properly defined to be, 'a rule of civil conduct, prescribed by the supreme power in a state, commanding what is right, and prohibiting what is wrong.'[1]

§ 3. Its primary objects —*rights* and *wrongs*.

Hence, to determine, define and prescribe the *rights* of men; and to prohibit, prevent or redress such *wrongs* as may be committed by them; these are the grand and primary objects of every system of positive law.[2]

§ 4. Rights distinguished.

(1 *a*) RIGHTS, as defined and prescribed by positive laws, are denominated *positive* rights; and these are primarily distinguished into *public* and *private: public*, as those of a body politic or political state; *private*, as those of private individuals or natural persons.[3]

§ 5. Public rights.

(1 *b*) PUBLIC RIGHTS, namely, those of a people considered as a political community or state, are either such as grow out of the political relations of a people to their state, or such as arise with the political relations of their

[1] 1 Bl. Com. 44.

[2] Id. 122.

[3] See Inst. 1, 1, 4; Dig. 1, 1, 2; Austin on Jurisprudence (Lond. 1869), p. 69–71.

state to other states: their public rights being *internal and absolute*, and thus independent of treaty or compact with other states; or *external and relative*, and therefore in part determined by inter-state legislation.

§ 6. Public absolute rights.

(1 *c*) PUBLIC ABSOLUTE RIGHTS, or those of a political community in relation to its members and subjects, are strictly analogous to those absolute rights of private individuals which political states are originally designed to secure and protect; and corresponding to the three great original rights of LIFE, LIBERTY, and PROPERTY, are none other than the rights of POLITICAL EXISTENCE, POLITICAL SOVEREIGNTY and POLITICAL DOMAIN. Of these we treat in the present book.

(1 *d*) OF THE RIGHT OF POLITICAL EXISTENCE: AND HEREIN, FIRST

(1 *e*) OF THE GENERAL NATURE OF A POLITICAL STATE.

§ 7. Political existence.

THE RIGHT OF POLITICAL EXISTENCE, the right of a people to exist in the character and capacity of a sovereign political state, is a right that can only be well understood, or properly explained, as it relates to the people or peoples of this country, by considering, first, *the general nature of a political state*; secondly, *the political state of the Anglo-American colonies*; and, thirdly, *the political measures of the American Revolution*. Of these then in their regular order. And, first—

THE GENERAL NATURE OF A POLITICAL STATE, I shall now consider, but with reference to those things only which are absolutely essential to its existence as such: namely, a *country*, a *people*, and a *government*.

§ 8. Of the country and title thereto.

(1) A COUNTRY is obtained, either as an original acquisition by discovery and settlement, or as a derivative acquisition by negotiation and purchase, or else by right of war

and conquest.[1] Thence the title descends from generation to generation, as the common inheritance of the people. It was chiefly by the first and second of these methods that our title to this country was originally acquired.[2]

According to the theory of feudal sovereignty,—a theory adopted by the European states, and generally conceded by the original discoverers of the country in favor of the governments by whom they were respectively commissioned,—the title to the portions within the jurisdictions of the British colonies, was considered as vested in the crown of Great Britain; the title to the remaining portions, by force of the same principle, being vested in the crown of Spain, or the crown of France.[3] But the colonial struggle for independence, the American Revolution, put an end to the theory of feudal sovereignty on this side of the Atlantic, at least, and established, instead, that of the sovereignty of the people of each state; and thence the prerogatives and regalities which before were conceded to the crown of Great Britain, became immediately and rightfully vested in them.[4] And, therefore, it is held by our courts of the highest resort, that the people of each state, in their own sovereign right, are invested with the absolute title to all the territory, and to all the navigable waters and the soils

[1] See Johnson *v.* McIntosh, 5 Pet. Cond. Rep. 537.

[2] Id. 528 to 535.

[3] 'All the lands we hold were originally granted by the crown. Our whole country has been granted; and the grants purport to convey the soil as well as the right of dominion to the grantee. Here [in these grants] the absolute ownership is recognized as being in the crown, and to be granted by the crown, as the source of all title; and this extends as well to land covered by water as to dry land. * * * All grants of land, whether dry land or covered with water, are, for great public purposes, subject to the control of the sovereign power of the country.' Martin *et al. v.* Waddell, 16 Pet. 426. This is strictly in accordance with the principle of the British government, that all lands are holden of the king. In point of strict justice, however, the title of the king of England to this country, was but little better than that of the Pope of Rome, Alexander VI, who, as the successor of St. Peter and Vicegerent of God, granted the whole of this Western world to the crown of Castile and Arragon. See note to Vattel, L. of N. lib. 1., § 208.

[4] Martin *et al. v.* Waddell, 16 Pet. 416.

under them, within the jurisdiction of their state, for their own common use; subject only to the rights or powers which each state has delegated by the federal constitution to the government of the United States.[1] The title to the territories acquired since the Revolution, originally vested in the United States; in trust, however, for such of the people of the several states as should settle therein, form new states, and, in the capacity of states, be admitted as co-equal members of the federal union.[2]

§ 9. Whence a people derive their national character.

(2) A PEOPLE, while possessing those qualities which are common to their race, will derive that character which chiefly distinguishes them from every other people, from the nature and climate of their country.[3] In proportion as the country is of wide extent, of a diversified nature and variable climate, there will also arise, between the people of different sections, widely different customs, manners and institutions. This will inevitably be the case of a people who inhabit a vast continent, the geography and natural productions of which are infinitely varied, and hence they will greatly differ from a people who inhabit an island, where the climate and natural productions may

[1] Id. 16 Pet. 410.

[2] Although the title to the soil under the tide waters of the bay [of San Francisco] was acquired by the United States by cession from Mexico, equally with the title to the upland, they held it only in trust for the future state, and when California was admitted into the Union upon equal terms with the other states, absolute property in, and dominion and sovereignty over, all soil under the tide waters within her limits, passed to the state, with the right to dispose of the title to any part of said soils, subject only to the paramount right of navigation over the waters, so far as such navigation might be required by the necessities of commerce with foreign nations or among the several states. Per. Mr. Justice Field, in Weber *v.* Harbor Commissioners, Sup. Ct. U. S. Central Law Journal, Vol. 1, No. 41, p. 513.

[3] This subject is treated in a masterly manner by the great French philosopher, M. Victor Cousin, in his History of Modern Philosophy, Vol. 1, pp. 161 to 178 (Appleton's Ed., Wight's translation), tit. 'The Part of Geography in History.' Montesquieu, however, had previously made its consideration a distinguishing feature of his immortal work, 'The Spirit of Laws.' See also the 'Federalist,' No. 2.

vary but little, and the rising or setting of the sun may be witnessed by all at the very same moment.

Not the shortest of the pithy chapters of The Spirit of Laws, is rendered in these words—'If it be true that the temper of the mind, and the passions of the heart, are extremely different in different climates, the laws ought to be relative both to the variety of those passions, and to the variety of those tempers.'[1]

The natural and inevitable effects of the laws of the physical world should certainly not be overlooked, either by those who frame, or by those who sanction and adopt, the political constitutions of a country. For a law that may prove beneficial to the people of one section, may prove disastrous to the people of another. And therefore the laws, usages and customs, which have grown up with the people of a particular locality, should be allowed to remain in full force and effect concerning such matters as peculiarly relate to that people: such laws and customs having been approved by their wisdom and experience as conducive to their welfare and happiness; and the people of each section, as of each country, having a natural, inherent and inalienable right to govern themselves and to make their own laws, in relation to matters peculiarly and immediately affecting themselves.

Finally—

§ 10. Of government.

(3) A GOVERNMENT of some sort is also essential to the existence of a political state. It will, therefore, here be proper to analyze and consider the principal foundations of government, and the logically possible theories respecting the same.

In every political society, the sovereignty (the supreme power, involving the right of final judgment and supreme command,) is either divided, or vested exclusively in the government or exclusively in the people. The fundamental maxim of our constitutions being that all political power is inherent in the people, and that all just government is

[1] Montesquieu, S. of L. b. 14, c. 1. The remaining chapters of his 14th book are devoted to the diversities in question.

founded in their common will and consent, we shall here limit our analysis accordingly.

§ 11. Analysis of the American system.

The sovereignty, or power of final decision and supreme command, being vested in the people, the law of the state is the common will of all; and the public government, called indifferently democratic or republican, is based upon the two necessarily coexistent principles of which popular sovereignty is composed: viz,

(*a* 1) Individual self-government, personal liberty; the right of a man to govern himself by his own judgment, in relation to things peculiarly concerning himself, and by his agreements with others and the laws of society, in relation to things of equal importance to all. Here all are necessarily *equal in right;* no respect can be paid to mere power; everything proceeds from individual liberty and moral responsibility. The public government must consequently rest upon

(*a* 2) Common Consent: which consent is either,

(*b* 1) Presumed—implied from the constituted order of things: and here, whatever the government or form of government at any time existing, the assent of the people thereto is presumed from, as implied in, the fact of their submission to it; so that any kind of government, monarchy, aristocracy or democracy, may rest in the common implied consent of the people. Or, this common consent is

(*b* 2) Expressed—written, as in our political constitutions: Whereby, either,

(*c* 1) The right of individual self-government is *wholly ceded*, aliened and subjected to the instituted government: a supreme power of final decision, as to what is right or what wrong, is, in all cases, vested in our rulers by a written organic law of which they are the final expounders. Or,

(*c* 2) The right of self-government is *wholly reserved:* the final decision of all matters, as a natural and inalienable right, is retained by each and every individual, and by each and every political community or state. Or,

(*c* 3) The right of self-government is *partly ceded* and *partly reserved;* that is, distinguished into an *internal* right

and an *external* right; reserved as internal, that is as a right to govern one's self as one pleases in relation to things peculiarly concerning one's self; ceded, or rather conceded, as an external right, that is as a right to control affairs in which all are equally interested. Thus, upon this ground,

(*d* 1) Each member of society reserves the right of self-government respecting such actions and things as peculiarly concern himself, his own internal self-government, and the management of his own affairs; but concedes the control of such matters as are of equal importance to all, to a common government resting in the common consent of all.

(*d* 2) Each state or nation in like manner, reserves to itself the sovereign control of its own internal concerns; but concedes to every other an equal voice in the direction of affairs which are common to all. Finally,

(*d* 3) A union of nations or states, just as a political union of individuals, is possible as based on this principle; that is, as based on the delegation by each to a common government of all, of the direction and control of affairs which are of common and equal importance to all.

§ 12. Absolutism. Imperialism.

There are, then, three theories of our American system. Let us endeavor to obtain a correct idea of each.

It can hardly be necessary to notice the primary distinction between a *presumed or implied* consent of the people, and a *written constitution* in which their common consent is expressed. For public government, as founded in an *implied* consent of the people, is wholly unknown in this country; or, if not wholly unknown, exists only as a dream, only in the imagination of those political dreamers who would rebuild our system on the notion that all the powers of our federal government are derived from the will and consent of the 'Nation:' a will and consent which are nowhere evidenced, except by the fact of the general submission of our people to that government; nowhere evidenced, except as the *consent* of the people of Europe

is shown, that is, by their submission to governments founded solely in force, fraud and usurpation.[1]

But considering our system as founded wholly in our *written constitutions* of government, there still remain three possible theories, each of which should be well understood: the first of which is possible only on condition of supposing that whatever the power of the people may be, it is wholly and absolutely surrendered or ceded the moment they ordain and establish their organic law. This deserves a particular examination.

(1) THE RIGHT OF SELF-GOVERNMENT IS WHOLLY CEDED.—Upon this ground, the right of each member of society to govern himself by his own judgment, in relation to his own affairs, his own peculiar interests, his religion, vocation and pursuits, is wholly surrendered to the voice of the majority; a sovereign authority, a final jurisdiction, to say what is right, or what wrong, is, in all cases (not anything being reserved as subject to his own final judgment) vested in the common government. This ground is necessarily assumed by all who teach that the action of the constituted government, whatever that action may be, is final and conclusive. The theory is, that the natural sovereignty of man is merged in the *government* of the state; that, when once a people have formed themselves into a political body or state, all right is vested in the *government* of that body, which government is sovereign and supreme; consequently, the people themselves are its *subjects*, and the rulers (those who are called to maintain the constitution and administer the laws) are the *state*—the only political organic unit which is not reducible to a mere abstraction. Again: if they form a compact of union with other states, or ratify an organic law or constitution establishing such union, then, on the ground assumed, their sovereignty is lost,—is, together with that of each of the other states, forever vested and merged in their union. No state can then say what is right, or what wrong, or do anything contrary to the organic law of the union *as expounded by the*

[1] As to the theory of the 'Nationals,' Imperialists or Absolutists, see §§ 102 to 109, *post*.

*government of the union.* First, the liberty of the individual; next, the sovereignty of the state, is ceded, alienedy abandoned. Every step towards union, from the simplest association of individuals to the grandest spectacle of a union of nations and states, is a step in the direction of universal absolutism. Whether we are or are not, in this country, fast approaching to this species of government, demands the attention of every American. On the other extreme,—

§ 13. Anarchy.

(2) THE RIGHT OF SELF-GOVERNMENT IS WHOLLY RESERVED, as the natural, inherent and inalienable right of—

Each Individual. Each individual, consequently, is bound by those laws, and by those laws only, to which he has willingly become a party, and to which he willingly remains a party. All laws, being founded in common consent, are purely in the nature of agreement and compact. And since the right of self-government is inalienable, a man is bound only by his assent to such laws as purport not to cede this right, but to regulate matters of common concern. Even his assent to these he may at any time withdraw and revoke; not indeed so long as he continues a member of that society with which he acted in making these laws, except in accordance with provisions to which all have assented, but whenever he may choose to dissolve his connections with that society and attach himself to another. And so of

Each State. What is said of each individual is true of the state: for this is nothing but a political union of individuals, founded in compact.[1] *As individuals,* acting in virtue of our right of self-government, we form a compact of union, all with each, and each with all, and by it confer an authority upon such as may be chosen from among us to act in our name and behalf. This authority we may, of course, at any time revoke; acting either *each for himself,* or *all for all;* for each is a sovereign principal, and as such may resume the power he has delegated, either with, or

[1] Const. Mass., Preamble.

without, the consent of the others. But in whatever form this authority is at any time actually vested, it is, for the time being, the supreme authority, the political sovereignty of the state; whatever we do in pursuance of it, we do in virtue of our political sovereignty; whatever we do by way of resuming it, we do in right of our natural and inalienable sovereignty; this latter, as the right of final judgment upon questions of right, being just what each and all have reserved. Acting, then, in our political capacity, that is, under the laws of our state, we are a political unit, A STATE; and AS SUCH, form a compact of union with OTHER STATES—a confederacy: it matters not whether we say by law or by compact; for all laws must be in the nature of compact, based on common consent; and these laws must be such that the sovereignty of the state is not compromised by them. Now the STATE, just like the individual, is bound by those laws only to which it has willingly become a party, and to which it willingly remains a party. Its sovereignty, its right of final judgment in *all* cases, is reserved. And consequently, acting in its political capacity, and by virtue of its inherent political sovereignty, it may at any time dissolve its connection with the union, and so absolve itself from the operation of its laws, either with, or without, the consent of the others. On this ground, the right of SECESSION, individual and state, is not to be questioned.

Let us advance to the true theory, that which in this country has been and still is very generally supported (with more or less consistency) by the conservative men of all parties, and which, though seemingly a compromise between the two extremes, in reality rests upon an equally original and independent basis.

§ 14. Federalism.

(3) THE RIGHT OF SELF-GOVERNMENT IS NOT WHOLLY CEDED NOR WHOLLY RESERVED, but is rather defined as subject to certain limitations agreeing with the natural and essential difference, or boundary line, between this right of self-government as, on the one hand, an *internal and absolute* right, and, on the other, an *external and relative* right.

There is, doubtless, a natural and necessary boundary line between the particular jurisdiction of each individual, over matters peculiarly concerning himself, and the general jurisdiction of all the members of society, over matters in which all are equally interested. The same is true of political states; for these must also exist, at one and the same time, each in relation to its members, and all in relation to each other. Hence—

Individual liberty.

(1) Each individual, respecting such actions as peculiarly relate to himself and do not affect his natural and necessary relations to others, is originally invested with the right of self-government, as a *natural, inherent* and *inalienable right:* and to this extent,—which is indeed the full extent of his *natural* right of self-government,—he is sovereign, free, and responsible to no man or body of men. So when he becomes a member of political and civil society, this right is reserved and secured, so far as its exercise does not affect his political and civil relations to others. Both *naturally* and *politically* he is *one of a society of equals;* and, therefore, as to matters in which all are equally concerned, he is entitled to an equal voice. For this reason, he is bound by those laws which do not cede or impair his *absolute* right of self-government, or his right to an equal voice in the common government of all, but relate to things in which all are equally concerned, and are based on common consent. His right to say what is right or what wrong, his right of *final* judgment, though *equal* to that of any other member of society, is co-extensive only with his right of self-government. He cannot, therefore, dissolve his connections with that society of which he is a member, by any mere act of his own volition, and without the common consent of all; as well can a man have a right to dissolve a solemn obligation to which he is a party, without the consent of those to whom he is bound.

§ 15. State sovereignty.

(2) What is said of the individual is applicable to the political state. So far as concerns the regulation of its own *internal* affairs, the conduct of persons in their rela-

tions with each other *as members of the state*, it is sovereign and supreme, free and independent. But a state or nation, *in relation to states or nations*, must yield to those laws which are founded in the *common consent* of nations. In the exercise of its own internal jurisdiction, its judgments are final and conclusive. But concerning matters of external and common concern, its final decisions must be subject to review by others; and all must finally yield to the voice of common consent. International law does not admit of the absolute sovereignty of any nation or state, except in respect to the rightful control of its own internal affairs.

§ 16. Government of States united.

(3) On the principles announced, a UNION of NATIONS or STATES, in their several capacities as such, is clearly possible. Any number of sovereign political bodies may unite themselves together with a view to their external and foreign relations, each reserving the sovereign control of its own *internal* affairs. Suppose, then, a UNION of NATIONS or STATES, providing by its organic law for a common government of all, with legislative, judicial and executive powers, coextensive with the *external* sovereignty of all over things in which all are equally concerned, but reserving to each its *internal* sovereignty as to persons and things within its jurisdiction. Where, it may be asked, would the right of final judgment reside—in each member of the union, or in the government of the union? This question can only be equitably settled by determining the BOUNDARY LINE between the INTERNAL SOVEREIGNTY OF EACH and the EXTERNAL SOVEREIGNTY OF ALL. The fixing of this line is of paramount importance in establishing the organic law of the union: if it be not definitely fixed by the organic law itself, but suffered to remain uncertain, a conflict of judgments will inevitably arise, in which the union, as a union of nations or states, must ultimately perish. It cannot be supposed, however, that powers would be vested in the union, or general government, unless with immediate reference to this boundary line. Hence this line would be determined by the nature of the powers reserved by each mem-

ber on the one hand, or vested in the union on the other. As nations or states united, the right of final judgment, in certain cases, would doubtless remain with each member of the union: for this right could not be wholly conceded to their general government, so long as a vestige of the internal sovereignty of each was preserved: so long, in fact, as the union remained a union of states or nations as such.

If the union be not of nations or states, in their several political and sovereign capacities as such, but of the *individuals* of which they are composed; then the nations or states who have formed such union have thereby wholly ceased to exist, either as internally or as externally sovereign: all are merged into *a single nation or state*, a *political union of individuals* as such; and the scheme of a *union of states* is resolved into that of a *single state*. This should not be overlooked. The possibility of a union of nations or states as such, is the possibility of an organic law which shall clearly establish the boundary line between the internal sovereignty of each and the external sovereignty of all, by means of an *enumeration* and *specification* of the *powers* of the union. For if this line cannot be fixed *by the organic law* of the union, and thence be preserved, as the only *criterion* of the powers of the government of the union on the one hand, and of the powers of the governments of the states on the other, then the very *principle* of this final scheme is proved abortive. This will be evident to all who consider the principles on which the different theories presented are assumed to be possible.[1]

[1] Let us particularly examine the FOUNDATIONS of this sort of government. It rests upon the doctrine of *natural, inherent* and *inalienable rights*. This doctrine of *inherent and inalienable rights*, is the peculiar characteristic of our American constitutions. But for foreign jurists in general, and indeed for some of our own, it is simply *terra incognita*, by no means approachable from their point of view, or if so, obscured by the ruins of imperial Rome. Austin repudiates it wholly, and the jurists of the Continent are likewise unweaned from the fountains of the civil law. Even many of our own jurists and statesmen, all those of the National or imperial school, reject it in silent contempt. In fact it belongs to no system or creed but that of the American '*people*,' and is found no-

Finally, that *common consent*, upon which government is founded, might logically seem to be possible as *partly implied* where as a positively recognized basis of political government, except in our American constitutions. Here, in this country, however, it erects a positively recognized boundary line between the powers confided to government, and the rights reserved to 'the people;' between the rights of each member of society, and the rights of society considered as a whole; between the rights of each state, and the rights of the United States. *Which* of our *rights*, then, it is asked, is *inherent and inalienable?* Our natural *liberty* or *right of self-government*,—the right of a man to govern himself as he pleases, in relation to things peculiarly and immediately concerning himself, and to an equal voice with others, where others with him are equally concerned,—is clearly a *natural, inherent* and *inalienable right*. This, we say, is an *inalienable right. For a man is not so far his own master, that he can alien his nature, or the ties of duty and right which are essential to the rational enjoyment of his nature.* If then he consent to cede the government of himself to another in other words, to become a slave, his consent or agreement is absolutely void. Such an agreement, whatever the consideration or inducement, can impose no rational or moral obligation, can enjoin no duty and confer no right. The moral responsibility of self-government can never be shifted from one to another. As well may a man transfer his personal being—his reason, to perceive and know; his understanding, to judge, and his will to do, what is right or what wrong. It is therefore not to be denied, that men have rights (such, among others, as the right to worship God according to conscience,) in the exercise of which, *each is the final judge* of what he may do. It is equally apparent, that in matters of common and equal importance to all, each is bound by the common voice of all, that is, by the common consent or agreement of all.

§ 17. Common consent as partly implied.

Now how may public government be *actually* founded in this *common* consent? As the *basis* of all, there must be an *agreement, compact* or *covenant*, between the individuals composing the state, by which they confer legislative, judicial and executive powers upon persons chosen by them and in accordance with that agreement. And who are to *judge in the last resort*, of the *obligation* of this social compact,—of the duties and powers of the government, on the one hand, and of the parties to the compact on the other? If in the last resort, the government itself is the judge of these matters, its power is virtually absolute; for, in this case, it has all the powers it may judge to belong to itself. But its powers are necessarily limited by the will of the parties to the compact in which it is founded. It cannot therefore judge, in the last resort, of the extent of its powers, or of the rights of those parties. Those parties, then, who themselves are the authors of the fundamental law are to judge, in the last resort, of the powers conferred, and of the powers reserved. I say *in the last resort;* for always, in the first instance, the agent must act upon his own understanding of the authority delegated to him. Sup-

*plied* and *partly expressed.* But here we have only to consider, that if it be *not wholly expressed*, but left to be *partly*

pose, then, that in the construction of the organic compact, a difference arises between the parties; by what *criterion* should judgment be given? The relative rights of persons are naturally doubtful and imperfect, except so far as determined by positive common consent. Their *absolute rights*, however, are *naturally perfect*, being *inherent, inalienable*, beyond the power of the human will, and therefore of higher authority than any merely human legislation. These, therefore, must be the CRITERIA of judgment in cases of doubt. For nothing can be valid as against them. The right of individual self-government, for instance, the foundation of all government, cannot be affected by human legislation. This right, as susceptible of definition, is the right of a man to govern himself in things alone concerning himself, by what his own reason prescribes as reasonable; and in matters where others with himself are equally involved, by his agreements with them and the laws established by common consent. Here we find the natural and necessary *boundary line*, between those *things which rest in common consent*, and *those which are wholly independent of human legislation.* Now human legislation, common consent, is the acknowledged source of *political* sovereignty. Political sovereignty, then, the power of the political state as such, cannot be construed to authorize laws which infringe upon the absolute right of individual self-government, as just defined. It thus appears, that all *political sovereignty*, how absolute soever we suppose it to be, is *subject to natural limits;* and that if a people should actually grant to their government an arbitrary and unlimited power, this grant would itself be void and of no effect.

But what proportion of the number of the parties to the social compact may give the final judgment upon questions involving its interpretation and construction? In other words, *what is a naturally sufficient majority for the decision of matters of common concern?* It is doubtless true, that if there be any justice in allowing the decision of a majority to overrule that of a minority, then the greater the majority the greater the justice of their cause and the more binding their decision.

In order to a just disposition of this question, we must carefully distinguish the absolute rights of men, from those which arise in their relations to each other. For all our people agree that men have rights which are inherent from birth, inseparable from their nature, and therefore inalienable, not to be varied or changed by the act of a majority, nor even by the act of all together. *It is therefore only in matters which involve their relations to each other, and which are of common and equal importance to all, in their character of members of society, that the will of all is the law of each.* Even in their relations to each other, there are certain *fundamentals*, which cannot be positively settled while a respectable minority dissents; and this very question, of the number of

*implied*, from the nature and objects of the organic law, or from anything else, the government assumed to be founded

voices sufficient to determine the will of the whole, is one of those fundamentals.

It does not appear that reason determines how great the majority should be in matters not fundamental and not requiring the concurrence of all. But certain it is that reason denies the power of majorities in things fundamental, as well as concerning the absolute rights. *Natural equity requires, that whatever affects or concerns all, should have the approbation of all.* And this maxim of the civil law is peculiarly applicable here; though not to those legislative assemblies which owe their existence to the social compact or fundamental law. The question, therefore, what majority may speak for all must be decided by a *fundamental article of the organic law;* that is, by the unanimous consent of all concerned. And then, if all agree that a number less than the whole shall decide, a decision by that number, on matters not fundamental and therefore within their control, must stand as the decision of all. We say, *on matters not fundamental and therefore within their control;* for, as has just been shown, there are *natural* boundary lines, beyond which no human legislation can go.

The *bills of rights* contained in our state constitutions, were doubtless originally designed to establish the *boundary line*, on the one side of which, matters of common and equal importance to all the members of society should be subject to laws expressive of the common will and consent; but on the other side of which line, no human legislation should be suffered to conflict with the rights declared to be *inherent and inalienable.* The federal constitution, as we shall hereinafter see, was framed in view of the very same boundary line, as it respects the internal self-government of each state, on the one hand, and the common government of all the states, on the other. Hence a fundamental principle, a truism in our system; that, just as each individual member of society is naturally sovereign, free to govern himself as he pleases, in matters concerning no one but himself; so is each member of the Union, each individual state, politically sovereign, free to govern itself as it pleases, in matters alone concerning itself and its members; and so, also, is the society of political communities, the United States, formed by the common voice of the states, politically sovereign, free to govern itself as it pleases, in matters alone concerning itself and its members. What those matters are, which *peculiarly* concern each individual member of society, and in respect of which he is absolutely sovereign and free, the Bills of Rights in our state constitutions very precisely ascertain. What those matters are which peculiarly concern each state of the Union, and in respect of which it is absolutely sovereign and free, can at all times be as precisely ascertained by reference to the state constitutions on the one hand, and to the constitution of the United States on the other. What those matters are which peculiarly concern the United States, and

therein must sooner or later become a government of unlimited and arbitrary power; for, whatever the power it may choose to assume, the *assent* of the people thereto is from something *implied;* and with every new assumption of a power as implied, the government takes a step, and that directly toward the goal of imperial and unlimited power, from which it is not in the nature of things that it should ever recede.

In this connection I would say, that there is more to be feared by the people of this country from this very scheme of a gradual absorption of power than from all other dangers, internal and external, combined.

§ 18. Definition of a nation or state.

It follows, from what we have seen, that the definition or description of a political state must necessarily vary according as the right of self-government, the supreme and unlimited authority or paramount sovereignty of the people, is reserved to themselves or vested in their rulers: in other words, according as we adhere to the one or to the other of the two principles, *the sovereignty of the government*, or *the sovereignty of the people.*

According to the renowned oracle of the English common law, 'A state is a collective body, composed of a multitude of individuals, united for their safety and convenience, and intending to act together as one man. If it therefore is to act as one man, it ought to act by one uniform will. But, inasmuch as political communities are made up of many natural persons, each of whom has his particular will and inclination, these several wills cannot by any *natural* union be joined together, or tempered and disposed into a lasting harmony, so as to constitute and produce that one uniform will of the whole. It can, therefore, be no otherwise produced than by a *political* union; by the consent of all persons to submit their own private wills to the will of one man, or of one or more assemblies of men,

in respect of which they are collectively sovereign, can at all times be as precisely ascertained by reference to their organic law, their treaties with other states or nations, and the general code of positive international law.

to whom the supreme authority is intrusted; and this will of that one man, or assemblage of men, is in different states, according to their different constitutions, understood to be law."[1]

This description of a state, be it observed, is applicable only to states wherein the supreme authority is intrusted to the will of one man, or of one or more assemblies of men, and not as with us, reserved to the people themselves.[2]

Suppose the individuals composing a society should agree to submit their own private wills to the will of one man, or of one or more assemblies of men; could such an agreement be binding? That a state of slavery can arise from any agreement, Blackstone himself most positively denies.[3] The natural liberty of man, that is to say, his duty and his right of self-government, are inherent and inalienable, and can no more be ceded or transferred than can his moral responsibility or his conscience itself. It is therefore clear that this 'consent of all persons to submit their own private wills to the will of one man, or of one or more assemblies of men,' which is designed to establish upon the ruins of the sovereignty of the people, the sovereignty of political government, is nothing but a fiction, invented to conceal the iniquity and deformity of arbitrary power.

What indeed is the original warrant for the institution of the political state? It is certain that this can be nothing else than the inherent sovereignty of man—the RIGHT OF SELF-GOVERNMENT, which is, as we have seen, in the case of an individual, the right of a man to govern himself, in relation to things peculiarly affecting himself, according to his own judgment of what is right; and in relation to things in which others with him are equally interested, by his agreements with them; in the case of a people, the right of that people to govern themselves, in their relations to each other, by laws expressive of their common will and consent; in their relations to other political states, by their compacts or treaties with them. To suppose that this, the

[1] 1 Bl. Com. 52.
[2] See Judge Wilson's comments on Blackstone's theory, 2 Dall. 458–459.
[3] 1 Bl. Com. 424.

sovereign right of each and of all, from which all manner of human legislation originally and naturally proceeds, can rightfully commit a suicidal act, surrender itself 'to the will of one man, or of one or more assemblies of men,' is the most absurd of political absurdities. It must therefore at all times remain, where alone it naturally and originally resides, in the *people* of a state, whose will alone, not the will of one man or of one or more assemblies of men, is understood to be *law*.

§ 18*a*. General descriptions of a nation or state.

Puffendorf says, a nation or state is a compound moral person, whose will, united and tied together by those covenants which before passed among the multitude, is deemed the will of all; to the end that it may use and apply the strength and riches of private persons towards maintaining the common peace and security.[1]

By a nation or civil community, says Rutherford, we mean a complete or perfect society of men who are in possession of their personal liberties, and have united themselves into one body for the purposes of securing their rights and of promoting a common interest.[2]

And thus Vattel: Nations or states are bodies politic: societies of men, united together, for the purpose of procuring their safety and advantage by their joint efforts and mutual strength. Such a society, he adds, has its affairs and interests; it deliberates and takes resolutions in common; thus becoming a moral person, having an understanding and a will peculiar to itself, and being susceptible of obligations and rights.[3]

Quite as much to our purpose, perhaps, is the preamble to one of our state constitutions, in which it is declared by the people themselves, that the body politic is formed by a voluntary association of individuals; that it is a social compact, by which the whole people covenants with each citizen, and each citizen with the whole people, that all shall be governed by certain laws for the common good.[4]

[1] Puff. L. of N., b. 7, c. 2, § 13.
[2] Rutherf. Inst. b. 1, c. 1, § 11; b. 2, c. 2, § 1; Grotius, b. 1, c. 1, § 14.
[3] Vattel, L. of N. Prelim., §§ 1, 2.
[4] Preamble to Const. of Massachusetts.

§ 19. What is meant by a state in this country.

The description we give of a state in this country, must depend upon which of the three theories of our system we adopt. The first[1] assumes that the United States are a NATION, a SINGLE POLITICAL STATE, one single body of political co-equals, called 'the people,' in whom, as electors,[2] the political sovereignty of the country resides, and whose will, as expressed in the constitution of the United States, is their only organic and fundamental law; that a state, such as the commonwealth of Massachusetts, for example, is a mere municipal, local, or election division of the Nation.

In accordance with the second and third of the theories formerly mentioned,[3] a state, such as one of the United States of America, is a body of political co-equals, commonly called 'the people,' in whom, as electors, the sovereign and uncontrollable power originally resides, and whose will, as expressed and proclaimed by them in their written constitution of government, is their sole organic law and bond of political existence: that the United States are a community of such States, politically united only by a federal constitution and a general government founded therein. In other words, and in the language of the Supreme Court of the United States, 'A State, in the ordinary sense of the Constitution, is a political community of free citizens, occupying a territory of defined boundaries, and organized under a government sanctioned and limited by a written Constitution and established by the consent of the governed. It is the union of such States, under a common Constitution, which forms the distinct and greater political unit which that Constitution designates as the United States.'[4]

§ 20. Distinction between a nation and a state.

As will doubtless be observed, no distinction is made by any of the foregoing descriptions between a nation and

[1] *Ante*, § 12.

[2] It will hereafter appear that there are not and never were any electors clothed with the right of suffrage by authority of the Nation or authority of the United States.

[3] *Ante*, §§ 13 and 14.

[4] Texas *v.* White, 7 Wall. 721.

a state. Some writers endeavor to make a distinction between them, each stating it agreeably with the theory he desires to establish. If any distinction between them can be maintained, it is that which points out the one as a people peculiarly united by a natural order and condition of things, and considers the other as an artificial order and condition superadded thereto. Thus we speak of a people as a *nation*, when only considering their *natural* condition, as being naturally united by common qualities and characteristics which peculiarly distinguish them from every other people; as a *state*, when referring to their *political* condition, as being politically united under one and the same government and system of laws.

A single political state may be formed out of many different nations: a single nation may be the common parent of many different political states.

In this connection we may note, that the term *nation*, as applicable to the people of this country (a people composed of all other nations), is wholly foreign to our political system, and is not to be found in any of our political constitutions which were adopted prior to the late civil war.

§ 21. Duty of political self-preservation.

The duty correlative of the right of *political existence*, is obviously that of *political self-preservation;* a duty the performance of which consists in constant efforts to preserve the principles of the political constitution.

*National* self-preservation is quite another and a different matter. The *necessity* of this is always the plea in behalf of usurpation. Upon this ground, the principles of the political constitution can be no longer acknowledged. One supreme *necessity* rules; all that is done is done in the name of *necessity;* and those entrusted with the administration of the CONSTITUTION, whoever they be, and whatever the form of the government, have always a *necessity* of some sort or other, for their warrant and justification: so that under the plea of national self-preservation, the organic law of the political system is set at defiance, and political self-preservation, the preservation

of the political state, remains no longer possible for the people without recourse to political revolution. Hence the declaration to be found in many of our state constitutions, that 'The doctrine of non-resistance of arbitrary power is absurd, slavish, and destructive of the good and happiness of mankind.'[1] In short, the plea of national self-preservation is necessary only when treason to the constitution, and to the sovereigns who made it, is secretly intended. For, if what is proposed to be done may be done pursuant to the sovereign will, as expressed in the constitution, then this alone is the all sufficient warrant, and nothing is heard of *necessity*; but whatever is done is done by authority of the constitution, for the preservation of the political state, the maintenance of the regular administration of justice, and the protection of the liberties of the people.[2]

[1] Const. N. H. Part I, Art. 10; Md. Declaration of Rights, Art. 4; Tenn. Art. 1, § 2; Ky. Art. 18, § 2.

[2] 'Wise politicians know that every breach of the fundamental laws, though dictated by necessity, impairs that sacred reverence which ought to be maintained in the breast of rulers towards the constitution of a country, and forms a precedent for other breaches, where the same plea of necessity does not exist at all, or is less urgent and palpable.' Alexander Hamilton, The Federalist, No. 25, p. 115. 'Necessity, especially in politics, often occasions false hopes, false reasonings, and a system of measures correspondently erroneous.' Id. No. 35, p. 152. It is transparently clear to every reflecting mind, that the plea of necessity cannot be admitted, under a written constitution, without arming the rulers with an arbitrary power, superior to the sovereign will, a power to wholly subvert the organic law, and to rule by no rule but that of caprice. A more dangerous attack upon the constitution cannot be devised; and a people who permit it deserve to be enslaved.

To attack the CONSTITUTION of a state, says Vattel, and to violate its rules, is a *capital crime against the nation*; and if those guilty of it are intrusted with authority, they add to their crime a perfidious abuse of their trust. The nation ought constantly to repress all violations of the constitution, with the utmost vigor and vigilance. (Vattel, L. of N. b. 1, §§ 29, 30.)

## (2 *e*) OF THE POLITICAL STATE OF THE ANGLO-AMERICAN COLONIES BEFORE THE REVOLUTION.

§ 22. Rapid rise of the colonies.

From the meeting of the first legislative assembly in America (consisting of the governor, council and burgesses of Virginia), to the Declaration of Independence by the colonial congress of 1776, a period of but little more than a century and a half had elapsed. Within that period, the thirteen separate political communities known in England as 'our plantations in America,' had risen from the feeblest beginnings to so great a degree of prosperity as to number three millions of people, and sustain a commerce with the world amounting to more than a third of the whole trade of Great Britain. Their history is familiar. Their *political* state, however, before the Revolution of 1776, we propose to briefly review.

§ 23. Their political dependence.

Political states are either sovereign and independent, or subordinate and dependent. Of the latter sort were the American colonies under the British government. Settled at different periods of time, under widely different charters, grants or commissions, which rendered them wholly independent of each other, they were, nevertheless, bound by a common allegiance to the British crown.

§ 24. Different kinds of colonial governments.

According to the theory of the British constitution, the title to this country which the English acquired by right of discovery was vested in the crown as the representative of the nation; and the exclusive power to grant the same was a branch of the royal prerogative. The king could grant the title to the soil alone, reserving the power of government; or could grant them both, as it seemed expedient to him. The powers of government he could vest as he pleased; either in officers of his own appointment, in the proprietor or proprietors of the soil, or else in the people themselves. Hence three kinds of colonial governments, denominated *royal, proprietary* and *chartered.*

§ 25. *Royal* governments.

In governments denominated *royal*, the appointment of the governor and council was reserved to the crown, and only the members of the general assembly, the immediate representatives of the people, could be chosen or elected by them. Of this character were the governments of the colonies in New England, with the exceptions of Connecticut and Rhode Island; also the governments of New York, Virginia, Georgia, New Jersey after 1702, and the Carolinas after 1729. They were copied in a measure from that of the parent state. The legislative power was lodged in the governor, council and assembly; in England it was vested in the king, lords and commons. In both England and America the judicial power was vested in judges appointed by the crown. The assemblymen in the colonies, as the commons in England, were elected by the people. Acts of the legislature, in both countries alike, required the approval and sanction of the king.

§ 26. *Proprietary* governments.

In some of the grants, the title to the territory and the powers of government were granted to a *proprietor*, who was thus invested with the office of governor. Here the council, judiciary and subordinate executive officers were appointed by the governor, and the assembly only, as in the former case, was chosen by the people. Of this species were the governments of Maryland and Pennsylvania; also of New Jersey till 1702, and the Carolinas till 1721.[1]

§ 27. *Chartered* governments.

Another species of colonial government was founded in a *royal charter*, in virtue of which, all the officers, legislative, judicial and executive, were chosen by and from among the people. Of this kind were the governments of Connecticut and Rhode Island. The charter of Connecticut, granted by Charles II in 1662, was remarkably favorable to the liberties of the people. It vested all the powers of government, legislative, judicial and executive, in the freemen of the corporation; and continued to form the basis of the government of the state until 1818, when the people established the present constitution. The charter of Rhode

[1] See 5 Pet. Cond. Rep. 531, 532.

Island, also granted by Charles II, in 1663, and leaving the people of that province in like manner free to govern themselves, reserved no more than allegiance to the king; and this charter of their liberties remained in force, as the supreme organic law of the state, till even so late as 1842, when a new constitution of that state was framed and adopted by them.

§ 28. Internal divisions of the colonies.

The several colonies were internally divided into towns, townships or parishes, cities and counties. Their towns were small republics; their township meetings, assemblies of the people; where municipal affairs were debated and considered, township officers chosen, and legislative representatives elected. These meetings or assemblies were so many schools in which the people were early and constantly trained to the discussion and decision of political affairs.

§ 29. Relations to each other and to the parent state.

In relation to the parent state, the colonies were always considered, not as a single community, but as several and distinct political bodies, having their separate affairs, relations and issues, with the British crown. In relation to each other, all were equally sovereign, free and independent. Each of them had its own legislature, its own judiciary, its own executive, and its own peculiar laws. They had indeed their several disputes, verging upon wars, concerning their respective jurisdictions; the territorial limits of one or another being sometimes loosely defined. Connecticut laid claim to lands in Pennsylvania; Pennsylvania to lands in Maryland. Vermont was claimed by New York on the one hand and by New Hampshire on the other. Various were the disputes as to bounds. But the bounds of a colony or province being once ascertained, no one denied that the permanent inhabitants within those bounds were subject to one and the same political body. The people were governed by the laws of the colony to which they belonged, and exercised the right of suffrage as prescribed by those laws.

§ 30. Their common allegiance.

The subjects of each colony, however, were British subjects; all were bound by a common allegiance to the British crown; the nature of which obligation, or tie of the feudal subject to his feudal sovereign, is thus explained by Blackstone:

'Allegiance is the tie, or *ligamen*, which binds the subject to the king, in return for that protection which the king affords the subject. The thing itself, or substantial part of it, is founded in reason and the nature of government; the name and the form are derived to us from our Gothic ancestors. Under the feudal system, every owner of lands held them in subjection to some superior or lord, from whom or whose ancestors the tenant or vassal had received them; and there was a mutual trust or confidence subsisting between the lord and vassal, that the lord should protect the vassal in the enjoyment of the territory he had granted him, and, on the other hand, that the vassal should be faithful to the lord, and defend him against all his enemies. This obligation on the part of the vassal was called *fidelitas*, or fealty; and an oath of fealty was required by the feudal law, to be taken by all tenants to their landlord.' (1 Bl. Com. 366.)

§ 31. A common characteristic of the people.

From the settlement of the colonies, the characteristic of the people was their jealousy of their rights and liberties. Nor were they deficient in the knowledge of these. The study of government, politics and law, was not neglected by the Americans of the eighteenth century; and quick to perceive the tendency of political affairs, they were rather disposed to question the ordinary measures of government than to passively submit to the exercise of unknown or doubtful powers.

The parent state was equally jealous of the increasing prosperity and power of her colonies. Their growing wealth had provoked her cupidity, and the monopoly of their trade had replenished her revenue. The bare possibility that at ever so distant a time they should become independent was not to be thought of but with feelings of deep concern. Hence the various measures of the Brit-

ish Parliament, to secure the dependence of the colonies, on the one hand, and to draw a revenue from them, on the other.

§ 32. The issue between the colonies and the parent state.

Parliamentary supremacy was urged in England. Chartered privileges and the guaranties of the British constitution were asserted in America. Thus was presented the original issue between the colonies and the parent state; the question of taxation without representation being rather the occasion than the cause of the rupture between them.

The regular mode of obtaining aids from the several colonies, and the only mode consistent with the nature and principles of their governments, had been to make a distinct requisition on each, through its governor, for a grant of such sum or sums to the king, as it should deem in proportion to its means. Of their ability to contribute to the support of the parent state, the people of each colony had long been entitled to judge for themselves; and their voice had been heard through their chosen representatives in their several legislative assemblies. They had enjoyed this right from the time of their settlement in the country; and as no other mode of taxation, on the basis of representation, had ever been devised, they held it to be of the highest importance to them. They were not unwilling nor had they shown any indisposition, to grant such aids to the crown as were duly proportioned to their means, when called for in the usual constitutional manner.

But the right of parliament to tax the colonies, without their consent, had often been asserted in England, and was now to be put to a test. A revenue was now to be raised by taxing colonial imports, and imposing stamp duties on paper. In 1764, a bill was accordingly passed, imposing duties on goods imported by the colonists from such of the West Indies as did not belong to Great Britain; and in March, 1765, the stamp act was passed, though not without considerable opposition in the British legislature.

§ 33. The stamp act.

The passage of this act, requiring the use of govern-

ment stamps, aroused a general feeling of indignation among the people of the several colonies, to whom the measure appeared as evincing the design of parliament to tax them at pleasure, and without regard to their constitutional and chartered privileges. It furnished the topic of discussion throughout the country; the occasion of tumultuous gatherings and riotous proceedings in Boston; and of hostile and exciting expositions of ministerial designs in the public press.

A plausible pretext was given for this act: 'that a sum might be raised sufficient for the defence of the colonies against a foreign enemy.' This pretext failed to satisfy the colonies. They not only asserted their ability to defend themselves, but denied the right of parliament to tax them at all.

§ 84. Opposition thereto.

Before the passage of this act, the colonies had separately remonstrated, through their several representative agents in London; and now this opposition was strengthened and renewed. In every colony, associations of the people were formed, and agreements were made to prevent the sale of British importations, and thus to encourage domestic productions and home manufactures; by which it was hoped to arouse and enlist the manufacturing interests of England in favor of a repeal of the obnoxious acts.

§ 85. Congress of 1765.

The assembly of Virginia was in session when the news of the passage of the act was received; and on the 28th of May, 1765, passed spirited resolutions, asserting the exclusive right of that colony to tax herself, and preparing the people for systematic opposition.

In relation to matters of common concern, the colonies had long been accustomed to consult the sentiments and wishes of each other. The assembly of Massachusetts accordingly proposed, by resolutions passed on the 6th of June, that a congress of committees from the several colonial assemblies should be convened at New York, on the second Tuesday of October, to consult on the state of the colonies. This proposition was communicated to the other

colonial assemblies; and a committee of each was appointed, and specially instructed as to the objects in view. *Committees* from the assemblies of Massachusetts, Rhode Island, Connecticut, New York, New Jersey, Pennsylvania, Delaware, Maryland, and South Carolina, assembled at the time and place proposed. New Hampshire, Georgia, Virginia and North Carolina, were unrepresented in this body, although concurring in its objects. This congress, or *council of nine committees*,—each committee representing its own colonial assembly, and all convened for the purpose of petitioning for redress of common grievances,—framed a declaration of the rights of the colonies, a petition to the king, and a memorial to parliament, concerning the measures of which they complained. Assuming, as a fixed and settled principle of the British constitution, that taxation and representation were inseparable, and that the colonies were not, and could not be, represented in parliament, they declared that the exclusive power of taxing the people of the colonies resided in their own colonial legislatures.

§ 36. Omnipotence of parliament declared.

In March, 1766, after much debating in the British parliament, the repeal of the stamp act was carried; this, however, upon passing an act,—for securing the dependence of America on Great Britain,—which act declared that the parliament had, and of right ought to have, power to bind the colonies IN ALL CASES WHATSOEVER.

§ 37. Congress of 1774.

Thus early was the issue distinctly defined and presented. The unlimited power of parliament to bind the colonies, *in all cases whatsoever*, was asserted by Great Britain. This power of parliament was denied by the colonies; and the exclusive right of each to tax itself, in its own colonial assembly, was by each and by all explicitly affirmed.

The contest, thus begun, engaged the attention of the British legislature and colonial assemblies for many years, parliament persisting in arbitrary measures, and the colonies continuing to oppose them. The propriety of a second general council of the colonies was now become evident to

all; and in May, 1774, the assembly of Massachusetts again took the lead, proposing a congress of delegates from all the provinces, and appointing and instructing five persons, distinguished for their ability and patriotism, to represent Massachusetts in this congress. The example was approved and followed by eleven other colonies, by each of whom a number of delegates were accordingly chosen and commissioned.

This congress, composed of from two to seven delegates on behalf of each colony represented, assembled at Philadelphia on the 5th of September, 1774; and during its session, passed a series of resolutions, proposing such measures as seemed expedient, and recommending to the several colonies the appointment of committees to enforce them. Following very closely in the steps of its predecessor, it also adopted a declaration of rights, an address to the people of Great Britain, and a loyal petition to his majesty: for as yet, not even a desire for independence had been anywhere publicly avowed, and the only object in view was 'to promote and establish harmony, between Great Britain and the colonies, ON A CONSTITUTIONAL FOUNDATION.' After a session of nearly eight weeks, this congress dissolved itself, recommending to the colonies the election of delegates for another to meet at Philadelphia on the 10th of May, 1775, unless the redress of their common grievances should be before then obtained.

## (3 *e*) OF THE POLITICAL MEASURES OF THE REVOLUTION: AND HEREIN, FIRST,

### (1 *f*) OF THE RESUMPTION OF THE POLITICAL SOVEREIGNTY BY THE PEOPLE, PENDING THE REVOLUTION.

§ 88. Right of revolution.

The right of a people to an independent political existence depends in a measure on relations of fact; of which, however, the people themselves are the rightful judge: the original right of men to establish the political state, being

founded in nothing but the principle of self-government; and their right to resume, remodel and revest the political powers,—in a word, the right of revolution,—being given by the same original warrant. The political state is but a means to a definite end; and this end, as all admit, is the protection of mankind in the enjoyment of those absolute rights which were vested in them by the immutable laws of nature:[1] the right of self-government being one of those absolute rights, and the most important of all, since upon this the enjoyment of the rest depends.

§ 39. Political sovereignty resumable in three ways.

According to the nature and character of the colonial governments, no general authority over all could exist, other than that of the parent state; and no open resistance to this authority could rightfully be made, without a resumption of the political sovereignty by the people themselves, and a delegation of powers by them to their chosen representatives. But this resumption and delegation of the powers of government was possible only in one of three ways: either by the people of the whole country, acting as one people; or by the people of each colony severally, acting by and for themselves as a sovereign and independent community; or else by a confederacy of the colonies—each acting as a sovereign and independent body, and, at the same time, as a member of a larger political organization. In which of these three ways, or by whom, the political sovereignty was actually resumed, it is of primary importance to observe. For to the sovereign or sovereigns, the body or bodies of people, who originally resumed the powers of government, allegiance of course became due.

§ 40. In what way and by whom the powers of government were resumed and revested.

A period of suspense undoubtedly followed the dissolution of the congress of 1774. The question was, would the British government persist in its arbitrary course, and force the colonies to wholly surrender their rights of internal self-government, or actually resume the political sovereignty and maintain their rights by the sword? Sub-

[1] 1 Bl. Com. 124.

mission to arbitrary rule was not to be expected of the Americans of the eighteenth century. A persistent indifference to their many petitions for redress of grievances, on the part of the British government, was to be the signal for the assembling of another congress of the colonies on the 10th of May, 1775. But the election of delegates to this congress meant nothing less than a full and complete resumption of the political sovereignty. By whom?—the congress or the colonies? Since the delegates to this congress were to be, as those of the preceding congress had been, appointed and commissioned by and on behalf of each colony, and since the powers of each several body of colonial delegates were to be derived from the people of the colony by and on behalf of whom chosen and commissioned, it followed, as a matter of course, that this resumption of the political sovereignty was to be by the people of each of the colonies severally, as a sovereign and independent community. The delegates to this congress were accordingly chosen and commissioned, not by the people of the country at large, but by the people of each colony, acting as a separate and sovereign body, by and through their deputies in their state or colonial convention, or their representatives in their colonial assembly.[1]

[1] In either case, whether the delegates from each colony to the general congress were chosen by the deputies of the people in their state or colonial convention, or by their representatives in their colonial assembly, or by municipal corporations, the authority of those delegates, however general or limited, was derived from the people of each colony, as the only acknowledged source of political power. In electing delegates or representatives, each body of people composing a colony or state, was governed by *its own election law;* and no one but a voter of that colony or state, qualified as such *by its own peculiar law*, was admitted to any participation in the resolutions of its sovereign will. No doubt can therefore emerge as to who 'the people' of *each colony* were; any more than now, as to who 'the people' of *each state* are; they originally were, and still are, *the body of voters or electors composing each state;* the only body from which, in our system, any authority of a public or political nature was ever derived. Nothing is more fundamental, or of greater importance, in our system, than a clear understanding of the simple facts, that the sovereign, supreme, and uncontrollable authority always resides in the body of voters or electors composing the political state;

Each colony deputed as many or as few deputies as it pleased, to represent and to speak its will, as a distinct, sovereign and independent state, in this congressional union or confederation of the states. The delegates of each several colony, varying in number at different times from two to nine, had only one vote, and this they cast, in every case, not individually as representatives of the people of the country at large, but as the separate and independent vote of one representative body, and for and on behalf of their own particular state; and this in the exercise of authority conveyed to them by their written instructions or commissions, as delegates or commissioners of the states they represented. No final vote was given in this congress but as the vote of a particular colony or state by name; the vote of each colony or state, given by its delegates, was given as the vote of a sovereign political body, and the congress itself was a congress, and the powers it wielded were powers, not of the American people as one political state, but of the THIRTEEN COLONIES OR STATES as severally sovereign, free and independent.

This is a part of our political history which no one has been able to obscure, and which conclusively settles the question by whom or what body or bodies the political

that the voters or electors composing a particular state, always vote *by their own inherent right*, and not by virtue of any extraneous authority; and that there always were as many independent bodies of electors, as there were states in the union. These *electors* are in fact the *absolute sovereigns;* there is *no restriction of their power, but their constitution; and this they change at their pleasure.* In the language of Chief Justice Marshall, '*The people made the constitution, and the people can unmake it. It is a creature of their will, and lives only by their will.*' Cohens *v.* Virginia, 5 Cond. R. 106. If it be said that the great chief justice, by '*the people*' meant *the people of the whole country as one political body*, the answer is, that no such meaning was possible, since, as every one knows, the voting by the people has always been done by them as *electors* of some particular state, and the people of each state vote and always have voted under their own election law, and not under or by virtue of any law or authority extraneous to their own will. Those who attempt to maintain that the people of the United States have a history as composing *one political body*, ought to show us an instance of an election at which some one elector, at least, voted under and by virtue of the law of that political body.

sovereignty was resumed and the powers of government revested.

§ 41. Action of the people of Massachusetts.

The actual resumption of the political sovereignty by the people of each colony commenced with the election of deputies to their state convention, or to their colonial assembly, by which convention or assembly their delegates to the general congress were appointed, commissioned and instructed. It is proper, however, to observe that, in many of the colonies, steps had been taken by the people in the same direction, long before this second congress was called. As early, indeed, as 1768, the royal governor of Massachusetts refusing to convene the general assembly, the people thereof by their deputies assembled in convention, all the towns but one being there represented, voted 'that there is apprehension in the minds of many of an approaching rupture with France,' and warned the inhabitants to put themselves in a posture of defence against any sudden attack of an enemy. This movement of the people of Massachusetts was occasioned by the news that a number of British troops had been ordered to Boston, and was, so far as it went, an actual resumption of the political sovereignty by the people of that commonwealth. In 1774, also, further asserting their right of self-government, upon the dissolution of the assembly by the royal governor, the members thereof resolved themselves into a provincial congress, and appointed committees of 'safety' and 'supplies,' and voted to equip twelve thousand men, and to enlist one-fourth of the militia as minute-men, who should be ready for action at a moment's warning.

§ 42. Movements in New Jersey.

As another instance of colonial movements having the same objects in view, it may also be noted, that early in July, 1774, the electors of the counties of New Jersey assembled in their county towns, and after passing resolutions in opposition to the measures of the British government, elected deputies to a colonial convention, and clothed them with authority to appoint and commission the delegates of that colony to the general congress of all the colonies, then

about to meet in Philadelphia. A second convention of the deputies of the people assembled at Trenton, May 23d, 1775; and, among other things, directed that one or more companies of eighty be formed in each township or corporation; and in order to raise the necessary funds, imposed a tax of £10,000. It re-assembled, August 5th, 1775, and directed that fifty-four companies be organized, each of sixty-four minute-men. This convention, or provincial congress, as it was called, not only represented and actually assumed the political sovereignty of the people of the colony, but also provided for its own duration and future existence, as the supreme head of the political state, by directing that, during the continuance of the struggle with Great Britain, the inhabitants qualified to vote should yearly choose deputies thereto. It again convened at Burlington, June 10th, 1776; and on the 2d of July of that year completed the work of framing and establishing a political constitution for the government of the state. Thus was the political sovereignty resumed, remodelled and revested by the people of that state.

§ 48. Other movements.

For a long time prior to the unanimous declaration of independence by the thirteen colonies, they had steadily advanced from their condition of colonial dependence, to the position of self-governing and independent states; and it is difficult to fix the exact point of time when any one became, in fact, possessed of those sovereign powers which before the Revolution were vested in the parliament of Great Britain. Prior to any declaration of independence in congress, New Jersey, Virginia, and South Carolina had severally ordained and established their state constitutions, and thereby completed the work of resuming, new-modelling, and re-vesting the powers of government, so far as it concerned themselves. In some of the colonies, the powers of government had already passed into the hands of the people, and changes in their organic law were wholly unnecessary. Connecticut and Rhode Island desired no freer constitutions than their respective charters; and these they continued to observe, as we have seen, not only throughout

the Revolution, but for many years after the adoption of the federal constitution. In others, also, the adoption of new constitutions was deferred, although the general congress had recommended to the several states the formation of such governments as would best promote the happiness of the people, pending the dispute with Great Britain. The resumption of the powers of government, however, was necessarily prior, in the nature of things, to any remodelling or new delegation thereof; prior, indeed, to any declaration of independence by the deputies or representatives of the people. A declaration of independence was doubtless proper, as a public political act, but in nowise essential to complete the independence of any of the states. Virginia, nevertheless, in a solemn convention of her people,—having previously instructed her delegates in congress to propose to that body to declare the colonies free and independent states, and being seemingly impatient of delay,—declared herself free, sovereign and independent, on the 29th of June, 1776. The people of the several counties and corporations of Virginia elected deputies to meet in state convention on the 6th of May, 1776, for the purpose of framing a government founded in the authority of the PEOPLE. This convention assembled at the time appointed, and continued in session till the 5th of July. On the 12th of June, the convention passed a Bill or Declaration of Rights, which was subsequently prefixed to the constitution of that state; as was also their Declaration of Independence: a comparison of which with the Declaration of Independence by congress on the 4th of July, might, we conceive, very naturally lead to the conclusion that the author of the one was the author of the other; even were it unknown that a delegate from Virginia was the proponent and author of the Declaration by congress.

§ 44. It is unimportant to fix the day or precise point of time, when any particular colony had actually completed the work of resuming to itself that political sovereignty which by the common consent of its people had long been vested in the government of Great Britain. But it is not unim-

portant to observe, respecting the method of resuming that sovereignty, that our history is no warrant for the assumption that *it was first usurped by a revolutionary body, and then gratuitously presented to the American people at large.*[1] If the resumption of the sovereignty by the people, was usurpation, the people of each colony, not the people of the whole country as one body, nor the members of the Continental congress, were the original usurpers, and this resumption or usurpation is first seen in the elections of delegates and representatives of the people, and these elections were conducted in each colony by the people thereof, acting by their own authority and sovereign will as expressed in their own election law. It is true that each of the colonies relied upon the general co-operation of all, and that from the beginning, this co-operation was to be directed by a common council of the confederate colonies, composed of delegates from each; the general character, and important political acts of which council, we will next examine.

### (2 *f*) OF THE GENERAL CONGRESS OF THE REVOLUTION.

§ 45. Composition and character of this congress.

The delegates composing this congress were chosen, as we have seen, not by the American people at large, either as subjects of England, or as citizens of America, but by the people of each colony, acting as a sovereign people, through their chosen representatives. No tolerated usurper or body of usurpers was acknowledged to be the source of

[1] Volumes upon volumes of political jargon, have latterly been published, which must, by every logical mind, be reduced to this absurd assumption; and this, from Story to Von Holst, is ever repeated in one form or another, as the key note to the chorus of national unity. Heed the voice of wisdom and be wise! '*The Declaration of Independence did not create thirteen sovereign states, but the representatives of the people declared that the former English colonies, under the name which they had assumed of the United States of America, became, from the fourth day of July,* 1776, A SOVEREIGN STATE.' Von Holst's Constitutional and Political Hist. of the U. S. p. 6–7. This means, if it means anything, that the Continental congress was an irresponsible body of usurpers, and that this body was the source of all the rights which the people have enjoyed.

power. The people of each colony were the recognized sovereign of the state. They acted by their own authority, and so acting, under their own election law, delegated portions of their sovereign power as they pleased, and to whom they pleased. Thus their deputies in congress were their agents, elected by and from among themselves, or by and from among their elected representatives, and the people of each colony continued to be, throughout the revolution, not only the sovereign, but the source of those powers which were exercised by their agents in the colonial assembly or in the congress of the colonies.

The composition of the general congress of the colonies was therefore that of a congress of sovereign states, in which each state, however few or numerous its delegates, responded to the call of its name by a single vote.

As a matter of fact, it is very well known that no congress or convention of the colonies or states was ever convened in which the voting was not by colonies or states. Not a congress or convention of the American people, as one state or nation, either by themselves or their representatives, has ever been held, for the obvious reason that the *United* States are the *States* United.

§ 46. Its powers.

Nor were the powers of this congress unlimited. They were limited as delegated, viz., by the commissions and instructions given by each colony or state to the delegates chosen to represent it. The instructions were varied as emergencies seemed to require. But no delegate in this congress assumed to have an authority from the American people at large, or any authority other than that contained in his commission and his instructions from his own particular state. The powers of the delegates at first were indeed little more than advisory. But in proportion as the danger increased, those powers were gradually enlarged, either by letters of instruction from their several constituencies, or by implication arising from a kind of indefinite authority, suited to the unknown exigencies that might arise. That an undefined authority is dangerous, and ought to be intrusted as cautiously as possible, every

man must admit; and none could take more pains than the delegates to congress for a long time did to get their authority equally and regularly defined by a ratification of the *Articles of Confederation*.[1]

§ 47. Early measures of congress.

It will of course be borne in mind, that prior to the first meeting of this congress, May 10th, 1775, hostilities had actually commenced: the people of Massachusetts had resumed to themselves the powers of government, had armed themselves and met the foe in defence of their rights. The attention of Congress was therefore first engaged in devising plans and commending measures to the several colonies, with a view to the vigorous prosecution of the war, and the successful resistance of a military power which theretofore had been deemed irresistible. The course of Massachusetts was approved; her cause was espoused as the cause of all; and early in July, 1775, the delegates in congress united in proclaiming to the world the reasons for the appeal to arms. 'We are reduced' (said they) 'to the alternative of choosing an unconditional submission to the tyranny of irritated ministers, or resistance by force. The latter is our choice. We have counted the cost of this contest, and find nothing so dreadful as voluntary slavery.'

§ 48. Declaration of independence.

The desire for independence was not, at this time, uni-

[1] See a review of the powers of this congress by Iredell, Justice, in Penhallow *v.* Doane's Adm., 3 Dall. 91. From 'tracing the origin of the general powers of congress, from the time of the earliest exercise of their authority to the period when definite and express powers were solemnly and formally given to them by the Articles of Confederation,' that learned judge concludes in these words:—'I conclude, therefore, that every particle of authority which originally resided either in congress, or in any branch of the state governments, was derived from the people who were permanent inhabitants of each province in the first instance, and afterwards became citizens of each state; that this authority was conveyed by each body politic separately, and not by all the people in the several provinces or states jointly; and of course, that no authority could be conveyed to the whole but that which previously was possessed by the several parts; that the distinction between *a state* and *the people of a state*, has, in this respect, no foundation, each expression in substance meaning the same thing.' Id. p. 94.

versally entertained. In some of the colonies, the people were still looking forward to a just accommodation of differences, and a final re-union with the parent state. Even so late as November, 1775, the delegates in congress from Pennsylvania were expressly instructed to resist any movement for independence; while in many of the colonies, the soundness of the policy of a public and solemn declaration in accordance with the several positions which they had assumed, had been discussed and freely admitted. Such a declaration, it was thought, should be made in congress; the delegates of each colony being first instructed and clothed with authority in relation thereto. The convention of Virginia, in May, 1776, accordingly resolved, that her delegates in congress be instructed to propose to that body to declare the united colonies free and independent states, absolved from all allegiance to, and dependence on, the king and parliament of Great Britain. The assemblies of Maryland, Pennsylvania, and New York, which had shown the greatest reluctance, and forborne the longest, had now assented to the measure; and on the 7th of June, the resolution was proposed in congress, by Richard Henry Lee, of Virginia, and seconded by John Adams, of Massachusetts, 'That these united colonies are, and of right ought to be, FREE AND INDEPENDENT STATES; and that all political connection between them and the state of Great Britain is, and ought to be totally dissolved.' On the second of July, this resolution was approved, and entered on the journals.[1] The original draft of the declaration had been already prepared by Mr. Jefferson, of Virginia; and, on the memorable fourth of July, having undergone some slight alterations, it was adopted and sanctioned by a unanimous

[1] Upon the motion for independence, the voting (as on every other question) was by states, and there appears to have been a tie till the vote of Pennsylvania was given. Her vote was also divided; of her five delegates, two were for and two against the proposition, and the casting vote was carried, on the side of independence, by the vote of a single member of her delegation—John Morton. See 'Leiber's Encyclopedia Americana,' Ed. of 1832, Vol. IX, p. 57; 'Sanderson's Lives of the Signers,' Ed. of 1823, Vol. VI, p. 210; and 'Lossing's Lives of the Signers,' Ed. of 1848.

vote.[1] After having been engrossed it was, on the second of August, signed by the delegates then present; by some, indeed, who had not been appointed until after its adoption. As engrossed and signed, it read as follows:—

## DECLARATION OF INDEPENDENCE.

IN CONGRESS, JULY 4, 1776.

THE UNANIMOUS DECLARATION OF THE THIRTEEN UNITED STATES OF AMERICA.—When, in the course of human events, it becomes necessary for one people to dissolve the political bands which have connected them with another, and to assume, among the powers of the earth, the separate and equal station to which the laws of nature and nature's God entitle them, a decent respect to the opinions of mankind requires, that they should declare the causes which impel them to the separation.

We hold these truths to be self-evident:—that all men are created equal; that they are endowed by their Creator with certain unalienable rights; that among these are life, liberty, and the pursuit of happiness. That to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed; that whenever any form of government becomes destructive of these ends, it is the right of the people to alter or to abolish it, and to institute a new government, laying its foundation on such principles, and organizing its powers in such form as to them shall seem most likely to effect their safety

[1] 'So faultless had it issued from the hands of its author, that it was adopted as he had prepared it, *pruned only of a few of its brightest inherent beauties*, through a prudent deference to some of the states.' 'Wirt's Eulogy on Adams and Jefferson.' The authorship of the Declaration by congress was at one time in doubt. But though the author were now unknown, no doubt could well be entertained that he was the same with the author of the Declaration by Virginia of the 29th June, 1776, which, in very many respects, speaks the very same language, views and sentiments. See note to § 43, *ante*. That of Virginia may be found (prefixed to her constitution) in almost any of the publications of the state constitutions prior to the late war.

and happiness. Prudence, indeed, will dictate, that governments long established should not be changed for light and transient causes; and accordingly all experience hath shown, that mankind are more disposed to suffer, while evils are sufferable, than to right themselves, by abolishing the forms to which they are accustomed. But when a long train of abuses and usurpations, pursuing invariably the same object, evinces a design to reduce them under absolute despotism, it is their right, it is their duty, to throw off such government, and to provide new guards for their future security. Such has been the patient sufferance of these colonies, and such is now the necessity which constrains them to alter their former systems of government. The history of the present king of Great Britain is a history of repeated injuries and usurpations, all having in direct object the establishment of an absolute tyranny over these states. To prove this, let facts be submitted to a candid world.

He has refused his assent to laws the most wholesome and necessary for the public good.

He has forbidden his governors to pass laws of immediate and pressing importance, unless suspended in their operation, till his assent should be obtained; and when so suspended, he has utterly neglected to attend to them. He has refused to pass other laws for the accommodation of large districts of people, unless those people would relinquish the right of representation in the legislature—a right inestimable to them, and formidable to tyrants only.

He has called together legislative bodies at places unusual, uncomfortable, and distant from the repository of their public records, for the sole purpose of fatiguing them into compliance with his measures.

He has dissolved representative houses repeatedly, for opposing with manly firmness, his invasions on the rights of the people.

He has refused, for a long time after such dissolutions, to cause others to be elected; whereby the legislative powers, incapable of annihilation, have returned to the people at large for their exercise; the State remaining, in

the mean time, exposed to all the dangers of invasion from without and convulsions within.

He has endeavored to prevent the population of these states; for that purpose obstructing the laws of naturalization of foreigners; refusing to pass others to encourage their migration hither, and raising the conditions of new appropriations of lands.

He has obstructed the administration of justice, by refusing his assent to laws for establishing judiciary powers.

He has made judges dependent on his will alone, for the tenure of their offices, and the amount and payment of their salaries.

He has erected a multitude of new offices, and sent hither swarms of officers, to harass our people, and eat out their substance.

He has kept among us, in times of peace, standing armies, without the consent of our legislatures.

He has affected to render the military independent of, and superior to, the civil power.

He has combined with others to subject us to a jurisdiction foreign to our Constitution, and unacknowledged by our laws; giving his assent to their acts of pretended legislation:

For quartering large bodies of armed troops among us:

For protecting them, by a mock trial, from punishment for any murders which they should commit on the inhabitants of these states:

For cutting off our trade with all parts of the world:

For imposing taxes on us without our consent:

For depriving us, in many cases, of the benefits of trial by jury:

For transporting us beyond seas to be tried for pretended offences:

For abolishing the free system of English laws in a neighbouring province, establishing therein an arbitrary government, and enlarging its boundaries, so as to render it at once an example and fit instrument for introducing the same absolute rule into these colonies.

For taking away our charters, abolishing our most valu-

able laws, and altering, fundamentally, the forms of our governments:

For suspending our own legislatures, and declaring themselves invested with power to legislate for us in all cases whatsoever.

He has abdicated government here, by declaring us out of his protection, and waging war against us.

He has plundered our seas, ravaged our coasts, burnt our towns, and destroyed the lives of our people.

He is at this time transporting large armies of foreign mercenaries to complete the works of death, desolation, and tyranny, already begun with circumstances of cruelty and perfidy, scarcely paralleled in the most barbarous ages, and totally unworthy the head of a civilized nation.

He has constrained our fellow-citizens, taken captive on the high seas, to bear arms against their country, to become the executioners of their friends and brethren, or to fall themselves by their hands.

He has excited domestic insurrections amongst us, and has endeavoured to bring on the inhabitants of our frontiers, the merciless Indian savages, whose known rule of warfare is an undistinguished destruction of all ages, sexes, and conditions.

In every stage of these oppressions we have petitioned for redress in the most humble terms; our repeated petitions have been answered only by repeated injuries. A prince, whose character is thus marked by every act which may define a tyrant, is unfit to be the ruler of a free people.

Nor have we been wanting in attentions to our British brethren. We have warned them, from time to time, of attempts by their legislature to extend an unwarrantable jurisdiction over us. We have reminded them of the circumstances of our emigration and settlement here. We have appealed to their native justice and magnanimity, and we have conjured them, by the ties of our common kindred, to disavow these usurpations, which would inevitably interrupt our connexions and correspondence. They too have been deaf to the voice of justice and of consanguinity. We must, therefore, acquiesce in the necessity which de-

nounces our separation, and hold them, as we hold the rest of mankind—enemies in war, in peace, friends.

We, therefore, the representatives of the United States of America, in General Congress assembled, appealing to the Supreme Judge of the world for the rectitude of our intentions, do, in the name and by the authority of the good people of these colonies, solemnly publish and declare, that these United Colonies are, and of right ought to be, free and independent States; that they are absolved from all allegiance to the British crown, and that all political connexion between them and the State of Great Britain is, and ought to be, totally dissolved; and that, as free and independent States, they have full power to levy war, conclude peace, contract alliances, establish commerce, and to do all other acts and things which independent States may of right do. And for the support of this declaration, with a firm reliance on the protection of Divine Providence, we mutually pledge to each other our lives, our fortunes, and our sacred honour.

JOHN HANCOCK.

NEW HAMPSHIRE.
JOSIAH BARTLETT,
WILLIAM WHIPPLE,
MATTHEW THORNTON.

MASSACHUSETTS BAY.
SAMUEL ADAMS,
JOHN ADAMS,
ROBERT TREAT PAINE,
ELBRIDGE GERRY.

RHODE ISLAND, ETC.
STEPHEN HOPKINS,
WILLIAM ELLERY.

CONNECTICUT.
ROGER SHERMAN,
SAMUEL HUNTINGDON,
WILLIAM WILLIAMS,
OLIVER WOLCOTT.

NEW YORK.
WILLIAM FLOYD,
PHILIP LIVINGSTON,
FRANCIS LEWIS,
LEWIS MORRIS,

NEW JERSEY.
RICHARD STOCKTON,
JOHN WITHERSPOON,
FRANCIS HOPKINSON,
JOHN HART,
ABRAHAM CLARK.

PENNSYLVANIA.
ROBERT MORRIS,
BENJAMIN RUSH,
BENJAMIN FRANKLIN,
JOHN MORTON,
GEORGE CLYMER,
JAMES SMITH,
GEORGE TAYLOR,
JAMES WILSON,
GEORGE ROSS.

DELAWARE.
CÆSAR RODNEY,
GEORGE READ,
THOMAS M'KEAN.

MARYLAND.
SAMUEL CHASE,
WILLIAM PACA,
THOMAS STONE.
CHARLES CARROLL, of Carrollton.

VIRGINIA.
GEORGE WYTHE,
RICHARD HENRY LEE,
THOMAS JEFFERSON,
BENJAMIN HARRISON,
THOMAS NELSON, JR.,
FRANCIS LIGHTFOOT LEE,
CARTER BRAXTON.

NORTH CAROLINA.
WILLIAM HOOPER,
JOSEPH HEWES,
JOHN PENN.

SOUTH CAROLINA.
EDWARD RUTLEDGE,
THOMAS HEYWARD, JR.,
THOMAS LYNCH, JR.,
ARTHUR MIDDLETON.

GEORGIA.
BURTON GWINNET,
LYMAN HALL,
GEORGE WALTON.

§ 49. Operative clause of this act.

This grand manifesto was made, not upon the mere volition of the continental congress, but pursuant to instructions given by each of the colonies to its body of delegates. New Hampshire, it is true, had instructed her delegates in favor of a declaration of a very different character; declaring the united colonies *one* free and independent state.[1] But no other colony or state was willing to join in this measure; and therefore the delegates in congress,—those of each colony acting and voting on behalf, and by the sovereign authority, of their own particular state,—'solemnly publish and declare, that these United Colonies are, and of right ought to be, FREE AND INDEPENDENT STATES; . . . . and that, *as* free and independent states, they have full power to levy war, conclude peace, contract alliances, establish commerce, and do all other acts and things which INDEPENDENT STATES may of right do.'

§ 50. Confederation of the states.

In this connexion, however, it is proper to observe, that in the instructions given to its delegates by each of the colonies, powers were also conferred upon them with a view to their framing a CONFEDERACY of the states.[2] And therefore the motion of Richard Henry Lee, on the 7th of June, was not simply for independence, but also for 'a plan of CONFEDERATION, to be prepared and transmitted to the respective COLONIES for their consideration and approbation.'[3] A committee was accordingly appointed, on the

[1] See Bancroft's Hist. Vol. VIII, p. 438.
[2] See the same, pp. 378, 427.
[3] Bancroft, VIII, 389.

11th of June, consisting of one delegate from each state, to prepare the articles of confederation between the states; and this committee, appointed nearly a month before, and in anticipation of, the declaration of independence, reported the articles on the 12th of July, eight days after the declaration.[1] They were submitted to the several states for their ratification, and numerous objections and amendments were suggested by the states, or rather by the state legislatures; for they were not submitted to the people; which fact it was that afterward gave rise to the doubt of their validity. The first of these articles provided that 'The style of this confederacy shall be "THE UNITED STATES of America."' Anticipating this FEDERAL UNION, the delegates in congress use this language—'We, therefore, the representatives of THE UNITED STATES,' etc. And this UNION was, in the course of time, accordingly formed: eleven states, namely, New Hampshire, Massachusetts, Rhode Island, Connecticut, New York, Pennsylvania, New Jersey, Virginia, North Carolina, South Carolina, and Georgia, assenting to and ratifying the Articles of Confederation in 1778; and the two remaining states, Delaware, in 1779, and Maryland, in 1781.[2] In the next place, therefore, we direct attention to the ARTICLES OF THE UNION, at that time formed.

## ARTICLES OF CONFEDERATION AND PERPETUAL UNION BETWEEN THE STATES.

*To all to whom these presents shall come, we, the undersigned delegates of the States affixed to our names, send greeting:*

WHEREAS, the delegates of the United States of America, in congress assembled did, on the fifteenth day of November, in the year of our Lord one thousand seven hundred and seventy-seven, and in the second year of the Independence of America, agree to certain Articles of Confederation and perpetual Union between the States of New

[1] See Curtis's Hist. of the Constitution, Vol. I, p. 58.

[2] Elliot's Debates, Vol. I, p. 78.

Hampshire, Massachusetts-Bay, Rhode-Island and Providence Plantations, Connecticut, New-York, New-Jersey, Pennsylvania, Delaware, Maryland, Virginia, North-Carolina, South-Carolina, and Georgia, in the words following, viz:

Articles of Confederation and perpetual Union between the States of New Hampshire, Massachusetts-Bay, Rhode-Island and Providence Plantations, Connecticut, New-York, New-Jersey, Pennsylvania, Delaware, Maryland, Virginia, North-Carolina, South-Carolina, and Georgia.

ARTICLE I. The style of this confederacy shall be, 'The United States of America.'

ART. II. Each State retains its sovereignty, freedom and independence, and every power, jurisdiction and right, which is not by this confederation expressly delegated to the United States in congress assembled.

ART. III. The said States hereby severally enter into a firm league of friendship with each other for their common defence, the security of their liberties, and their mutual and general welfare; binding themselves to assist each other against all force offered to, or attacks made upon them, or any of them, on account of religion, sovereignty, trade, or any other pretence whatever.

ART. IV. The better to secure and perpetuate mutual friendship and intercourse among the people of the different States in this Union, the free inhabitants of each of these States, paupers, vagabonds, and fugitives from justice excepted, shall be entitled to all privileges and immunities of free citizens in the several States; and the people of each State shall have free ingress and regress to and from any other State, and shall enjoy therein all the privileges of trade and commerce, subject to the same duties, impositions, and restrictions, as the inhabitants thereof respectively, provided that such restrictions shall not extend so far as to prevent the removal of property imported into any State to any other State, of which the owner is an inhabitant; provided, also, that no imposition, duties, or restriction, shall be laid by any State on the property of the United States, or either of them.

If any person guilty of or charged with treason, felony, or other high misdemeanor, in any State, shall flee from justice, and be found in any of the United States, he shall, upon demand of the governor, or executive power of the State from which he fled, be delivered up, and removed to the State having jurisdiction of his offence.

Full faith and credit shall be given in each of these States to the records, acts, and judicial proceedings of the courts and magistrates of every other State.

ART. V. For the more convenient management of the general interests of the United States, delegates shall be annually appointed in such manner as the legislature of each State shall direct, to meet in congress on the first Monday in November, in every year, with a power reserved to each State to recall its delegates or any of them, at any time within the year, and to send others in their stead for the remainder of the year.

No State shall be represented in congress by less than two nor by more than seven members; and no person shall be capable of being a delegate for more than three years in any term of six years; nor shall any person, being a delegate, be capable of holding any office under the United States, for which he, or another for his benefit, receives any salary, fees, or emolument of any kind.

Each State shall maintain its own delegates in any meeting of the States, and while they act as members of the committee of the States.

In determining questions in the United States in congress assembled, each State shall have one vote.

Freedom of speech and debate in congress shall not be impeached or questioned in any court or place out of congress; and the members of congress shall be protected in their persons from arrests and imprisonments, during the time of their going to and from and attendance on congress, except for treason, felony, or breach of the peace.

ART. VI. No State, without the consent of the United States in congress assembled, shall send any embassy to, or receive any embassy from, or enter into any conference, agreement, alliance, or treaty, with any king, prince, or

state; nor shall any person holding any office of profit or trust under the United States or any of them, accept of any present, emolument, office, or title of any kind whatever, from any king, prince, or foreign state; nor shall the United States in congress assembled, or any of them, grant any title of nobility.

No two or more States shall enter into any treaty, confederation, or alliance whatever between them, without the consent of the United States in congress assembled, specifying accurately the purposes for which the same is to be entered into, and how long it shall continue.

No State shall lay any imposts or duties, which may interfere with any stipulations in treaties entered into by the United States in congress assembled, with any king, prince, or state, in pursuance of any treaties already proposed by congress to the courts of France and Spain.

No vessels of war shall be kept up in time of peace, by any State, except such number only as shall be deemed necessary by the United States in congress assembled, for the defence of such State or its trade; nor shall any body of forces be kept up by any State in time of peace, except such number only as, in the judgment of the United States in congress assembled, shall be deemed requisite to garrison the forts necessary for the defence of such State; but every State shall always keep up a well-regulated and disciplined militia, sufficiently armed and accoutred, and shall provide and have constantly ready for use, in public stores, a due number of field pieces and tents, and a proper quantity of arms, ammunition, and camp equipage.

No State shall engage in any war without the consent of the United States in congress assembled, unless such State be actually invaded by enemies, or shall have received certain advice of a resolution being formed by some nation of Indians to invade such State, and the danger is so imminent as not to admit of a delay till the United States in congress assembled can be consulted; nor shall any State grant commissions to any ships or vessels of war, or letters of marque or reprisal, except it be after a declaration of war by the United States in congress assembled, and

then only against the kingdom or state, and the subjects thereof, against which war has been so declared, and under such regulations as shall be established by the United States in congress assembled, unless such State be infested by pirates, in which case vessels of war may be fitted out for that occasion, and kept so long as the danger shall continue, or until the United States in congress assembled shall determine otherwise.

ART. VII. When land forces are raised by any State for the common defence, all officers of or under the rank of colonel, shall be appointed by the legislature of each State respectively, by whom such forces shall be raised, or in such manner as such State shall direct; and all vacancies shall be filled up by the State which first made the appointment.

ART. VIII. All charges of war, and all other expenses that shall be incurred for the common defence or general welfare, and allowed by the United States in congress assembled, shall be defrayed out of a common treasury, which shall be supplied by the several States in proportion to the value of all land within each State granted to or surveyed for any person, as such land and the buildings and improvements thereon shall be estimated, according to such mode as the United States in congress assembled shall from time to time direct and appoint.

The taxes for paying that proportion shall be laid and levied by the authority and direction of the legislatures of the several States, within the time agreed upon by the United States in congress assembled.

ART. IX. The United States in congress assembled shall have the sole and exclusive right and power of determining on peace and war, except in the cases mentioned in the sixth article: of sending and receiving embassadors: entering into treaties and alliances; provided that no treaty of commerce shall be made whereby the legislative power of the respective States shall be restrained from imposing such imposts and duties on foreigners as their own people are subjected to, or from prohibiting the exportation or importation of any species of goods or commodities whatsoever: of es-

tablishing rules for deciding in all cases, what captures on land or water shall be legal, and in what manner prizes taken by land or naval forces in the service of the United States shall be divided or appropriated: of granting letters of marque and reprisal, in times of peace: appointing courts for the trial of piracies and felonies committed on the high seas, and establishing courts for receiving and determining finally appeals in all cases of captures; provided, that no member of congress shall be appointed a judge of any of the said courts.

The United States in congress assembled shall also be the last resort on appeal in all disputes and differences now subsisting, or that hereafter may arise between two or more States concerning boundary, jurisdiction, or any other cause whatever; which authority shall always be exercised in the manner following: whenever the legislative or executive authority or lawful agent of any state in controversy with another shall present a petition to congress, stating the matter in question, and praying for a hearing, notice thereof shall be given by order of congress to the legislative or executive authority of the other State in controversy, and a day assigned for the appearance of the parties, by their lawful agents, who shall then be directed to appoint by joint consent commissioners or judges to constitute a court for hearing and determining the matter in question; but if they cannot agree, congress shall name three persons out of each of the United States, and from the list of such persons each party shall alternately strike out one, the petitioners beginning, until the number shall be reduced to thirteen; and from that number not less than seven nor more than nine names, as congress shall direct, shall, in the presence of congress, be drawn out by lot; and the persons whose names shall be so drawn, or any five of them, shall be commissioners or judges, to hear and finally determine the controversy, so always as a major part of the judges, who shall hear the cause, shall agree in the determination; and if either party shall neglect to attend at the day appointed, without showing reasons which congress shall judge sufficient, or being present shall re-

fuse to strike, the congress shall proceed to nominate three persons out of each State, and the secretary of congress shall strike in behalf of such party absent or refusing; and the judgment and sentence of the court to be appointed in the manner before prescribed, shall be final and conclusive; and if any of the parties shall refuse to submit to the authority of such court, or to appear, or defend their claim or cause, the court shall nevertheless proceed to pronounce sentence or judgment, which shall in like manner be final and decisive, the judgment or sentence, and other proceedings, being in either case transmitted to congress, and lodged among the acts of congress for the security of the parties concerned: provided, that every commissioner, before he sits in judgment, shall take an oath, to be administered by one of the judges of the supreme or superior court of the State, where the cause shall be tried, 'well and truly to hear and determine the matter in question, according to the best of his judgment, without favor, affection, or hope of reward:' provided, also, that no State shall be deprived of territory for the benefit of the United States.

All controversies concerning the private right of soil, claimed under different grants of two or more States, whose jurisdictions as they may respect such lands and the States which passed such grants are adjusted, the said grants or either of them being at the same time claimed to have originated antecedent to such settlement of jurisdiction, shall, on the petition of either party to the congress of the United States, be finally determined, as near as may be, in the same manner as is before prescribed for deciding disputes respecting territorial jurisdiction between different States.

The United States in congress assembled shall also have the sole and exclusive right and power of regulating the alloy and value of coin struck by their own authority, or by that of the respective States: fixing the standard of weights and measures throughout the United States: regulating the trade and managing all affairs with the Indians not members of any of the States; provided, that the legislative

right of any State within its own limits be not infringed or violated: establishing and regulating post-offices from one State to another, throughout all the United States, and exacting such postage on the papers passing through the same as may be requisite to defray the expenses of the said office: appointing all officers of the land forces in the service of the United States, excepting regimental officers: appointing all the officers of the naval forces, and commissioning all officers whatever in the service of the United States: making rules for the government and regulation of the said land and naval forces, and directing their operations.

The United States in congress assembled shall have authority to appoint a committee to sit in the recess of congress, to be denominated 'a committee of the States;' and to consist of one delegate from each State, and to appoint such other committees and civil officers as may be necessary for managing the general affairs of the United States, under their direction: to appoint one of their number to preside, provided that no person be allowed to serve in the office of president more than one year in any term of three years: to ascertain the necessary sums of money to be raised for the service of the United States, and to appropriate and apply the same for defraying the public expenses: to borrow money or emit bills on the credit of the United States, transmitting every half year to the respective States an account of the sums of money so borrowed or emitted: to build and equip a navy: to agree upon the number of land forces, and to make requisitions from each State for its quota, in proportion to the number of white inhabitants in each State; which requisition shall be binding, and thereupon the legislature of each State shall appoint the regimental officers, raise the men, and clothe, arm, and equip them in a soldier-like manner, at the expense of the United States; and the officers and men so clothed, armed and equipped, shall march to the place appointed, and within the time agreed on by the United States in congress assembled: but if the United States in congress assembled shall, on consideration of circumstan-

ces, judge proper that any State should not raise men, or should raise a smaller number than its quota, and that any other State should raise a greater number of men than the quota thereof, such extra number shall be raised, officered, clothed, armed, and equipped, in the same manner as the quota of such State, unless the legislature of such State shall judge that such extra number cannot safely be spared out of the same; in which case they shall raise, officer, clothe, arm, and equip, as many of such extra number as they judge can safely be spared. And the officers and men so clothed, armed, and equipped, shall march to the place appointed, and within the time agreed on by the United States in congress assembled.

The United States in congress assembled shall never engage in a war, nor grant letters of marque and reprisal in time of peace, nor enter into any treaties or alliances, nor coin money, nor regulate the value thereof, nor ascertain the sums and expenses necessary for the defence and welfare of the United States or any of them, nor emit bills, nor borrow money on the credit of the United States, nor appropriate money, nor agree upon the number of vessels of war to be built or purchased, or the number of land or sea forces to be raised, nor appoint a commander in chief of the army or navy, unless nine States assent to the same; nor shall a question on any other point, except for adjourning from day to day, be determined, unless by the votes of a majority of the United States in congress assembled.

The congress of the United States shall have power to adjourn to any time within the year, and to any place within the United States, so that no period of adjournment be for a longer duration than the space of six months; and shall publish the journal of their proceedings monthly, except such parts thereof relating to treaties, alliances, or military operations, as in their judgment require secresy; and the yeas and nays of the delegates of each State on any question shall be entered on the journal when it is desired by any delegate; and the delegates of a State, or any of them, at his or their request, shall be furnished with a transcript of the said journal, except such parts as are

above excepted, to lay before the legislatures of the several States.

ART. X. The committee of the States, or any nine of them, shall be authorized to execute in the recess of congress, such of the powers of congress as the United States in congress assembled, by the consent of nine States, shall, from time to time, think expedient to vest them with; provided that no power be delegated to the said committee, for the exercise of which, by the articles of confederation, the voice of nine States in the congress of the United States assembled is requisite.

ART. XI. Canada, acceding to this confederation, and joining in the measures of the United States, shall be admitted into, and entitled to, all the advantages of this union: but no other colony shall be admitted into the same unless such admission be agreed to by nine States.

ART. XII. All bills of credit emitted, moneys borrowed, and debts contracted, by or under the authority of congress, before the assembling of the United States, in pursuance of the present confederation, shall be deemed and considered as a charge against the United States, for payment and satisfaction whereof the said United States and the public faith are hereby solemnly pledged.

ART. XIII. Every State shall abide by the determinations of the United States in congress assembled, on all questions which, by this confederation, are submitted to them. And the articles of this confederation shall be inviolably observed by every State, and the union shall be perpetual; nor shall any alteration at any time hereafter be made in any of them, unless such alteration be agreed to in a congress of the United States, and be afterwards confirmed by the legislature of every State.

And whereas it has pleased the Great Governor of the world to incline the hearts of the legislatures we respectively represent in congress, to approve of and to authorize us to ratify the said articles of confederation and perpetual union: KNOW YE, That we, the undersigned delegates, by virtue of the power and authority to us given for that purpose, do, by these presents, in the name and in behalf of

our respective constituents, fully and entirely ratify and confirm each and every of the said articles of confederation and perpetual union, and all and singular the matters and things therein contained; and we do further solemnly plight and engage the faith of our respective constituents, that they shall abide by the determinations of the United States in congress assembled, on all questions which, by the said confederation, are submitted to them; and that the articles thereof shall be inviolably observed by the States we respectively represent; and that the union shall be perpetual.

In witness whereof we have hereunto set our hands, in congress. Done at Philadelphia, in the State of Pennsylvania, the ninth day of July, in the year of our Lord one thousand seven hundred and seventy-eight, and in the third year of the Independence of America.

*On the part and behalf of the State of New Hampshire.*

JOSIAH BARTLETT, JOHN WENTWORTH, jr., Aug. 8, 1778.

*On the part and behalf of the State of Massachusetts Bay.*

JOHN HANCOCK, FRANCIS DANA,
SAMUEL ADAMS, JAMES LOVELL,
ELBRIDGE GERRY, SAMUEL HOLTEN.

*On the part and in behalf of the State of Rhode Island and Providence Plantations.*

WILLIAM ELLERY, JOHN COLLINS.
HENRY MARCHANT,

*On the part and behalf of the State of Connecticut.*

ROGER SHERMAN, TITUS HOSMER,
SAMUEL HUNTINGDON, ANDREW ADAMS.
OLIVER WOLCOTT,

*On the part and behalf of the State of New York.*

JAS. DUANE, WM. DUER,
FRA. LEWIS, GOUV. MORRIS.

*On the part and in behalf of the State of New Jersey.*

JNO. WITHERSPOON, NATH. SCUDDER, Nov. 26, 1778.

*On the part and behalf of the State of Pennsylvania.*

ROBT. MORRIS, WILLIAM CLINGAN,
DANIEL ROBERDEAU, JOSEPH REED, 22d July, 1778.
JONA. BAYARD SMITH,

*On the part and behalf of the State of Delaware.*

THO. M'KEAN, Feb. 18, 1779, NICHOLAS VAN DYKE.
JOHN DICKINSON, May 5th, 1779,

*On the part and behalf of the State of Maryland.*

JOHN HANSON, March 1, 1781, DANIEL CARROLL, March 1, 1781.

*On the part and behalf of the State of Virginia.*

RICHARD HENRY LEE, JNO. HARVIE,
JOHN BANISTER, FRANCIS LIGHTFOOT LEE.
THOMAS ADAMS,

*On the part and behalf of the State of North Carolina.*

JOHN PENN, July 21, 1778, JNO. WILLIAMS.
CORNS. HARNETT,

*On the part and behalf of the State of South Carolina.*

HENRY LAURENS, RICHARD HUTSON,
WILLIAM HENRY DRAYTON, THOS. HEYWOOD, jr.
JNO. MATHEWS,

*On the part and behalf of the State of Georgia.*

JNO. WALTON, 24th July, 1778, EDWD. LANGWORTHY.
EDWD. TELFAIR,

§ 51. Treaty of peace.

To firmly secure the existence of the several colonies, in their new relations to each other and to the world, as a 'confederation and perpetual union' of 'free and independent states,' but one more fact now remained to be accomplished—the prosecution of the war to its successful termination in a treaty of peace, by which their political independence *de jure*, as well as *de facto*, should be acknowledged on the part of Great Britain. On the third of September, 1783, their counsels and arms having triumphed, a treaty of peace was signed by the commissioners of England and those of the United States; the first article of which treaty is in these words: —'His Britanic Majesty acknowledges the said United States, *viz.* New Hampshire, Massachusetts-Bay, Rhode Island and Providence Plantations, Connecticut, New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina, and Georgia, to be free, sovereign, and independent states: that he treats with them as such; and for himself, his heirs and successors, relinquishes all claim to the government, proprietary, and territorial rights of the same, and every part thereof.'[1]

From this brief outline of the political measures of the Revolution, let us proceed to consider the principles thereby established.

[1] Statutes at Large, Vol. VIII, p. 80.

## (8 *f*) OF THE PRINCIPLES ESTABLISHED BY THE REVOLUTION.

§ 52. Right of revolution.

The first grand principle established by the American Revolution, was the SOVEREIGN RIGHT of revolution itself: that is, the right of a people to resume to themselves the powers of their political state, and re-model and re-vest them at will: which is, indeed, when traced to its source, nothing else than the natural right of any and every principal, to revoke the authority which he has given to his agent, and appoint another in his place. I do not mean that this right itself, which presupposes and is founded in the natural, inherent, and inalienable sovereignty of man, could possibly become of additional force or obligation by virtue of that or of any other revolution; but that it was politically recognized, asserted and proclaimed, by the people of the several colonies, not only in justification of their own proceedings, but as the natural and universal right of all mankind. By the declaration of independence, as we have already seen, this right was declared and proclaimed to the world in these remarkable words:—'We hold these truths to be self-evident: that all men are created equal; that they are endowed by their Creator with certain inalienable rights; that among these, are life, liberty, and the pursuit of happiness. That, to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed; that, whenever any form of government becomes destructive of these ends, it is the right of the people to alter or abolish it, and to institute a new government, laying its foundation on such principles, and organizing its powers in such form, as to them shall seem most likely to effect their safety and happiness.'

§ 53. A question.

This doctrine of the declaration of independence,—denying the sovereignty of government, and affirming the sovereignty of the people, and thus giving the key-note to the political creed of every true American,—has been reaffirmed by the people of every state in the union, in their

organic law, or state constitution. But how, it may be asked, is this doctrine to be explained and applied in relation to a union or confederacy of states? No doubt is entertained, in this country, of the right of the people to resume to themselves the powers of their political state, and revise, remodel and revest them, at will. But speaking with reference to a union of states; what people do we mean? the people of each, or the people of all, of the states? If the people of all, no difficulty emerges. If the people of each, the question of their right must be further considered, with reference to the organic law of the union, and the boundary line which naturally exists, and which that law must firmly establish, between the internal sovereignty of each, and the external sovereignty of all. For, as we have already seen, the only possibility of a union of states, as such, is the possibility of an organic law which shall determine and fix this boundary line. The consideration of the question may therefore be deferred till the nature of the political system at present established by our organic law shall come to be examined.[1]

§ 54. Sovereignty of the states.

The positive recognition in the political world, of the original thirteen states, as severally sovereign, free and independent, was another result of their united struggle for separate independence.[2] It is often said that 'the revolt was not the work of the colonies acting separately and independently, in any assumed sovereign capacity, but of the people of all these local communities acting together through their representatives in the continental congress, which assembly, though revolutionary, provisional, tentative, and loosely organized, was essentially national;' that 'there never was, in fact, a moment's interval when the several states were each independent and sovereign;' that 'the blow which severed the connection with the British empire, did not leave a disintegrated mass made up of thirteen communities now independent; it left an united mass, a POLITICAL UNIT, a NATION possessing the high attrib-

[1] See § 150 *post.*
[2] See § 49, *ante.*

utes of SOVEREIGNTY which it had just exercised.'[1] This doctrine is taught by Story, and by many respectable writers of a recent date.[2] But our brief review of the political measures of the Revolution, leaves no question undetermined concerning the people by whom, or the manner in which, the political sovereignty was in fact resumed. It was, as we have seen, resumed by the people of each colony or state, acting, not as a part of some other political body, but as, and in the capacity of, a separate, independent, and self-governing community. It might have been resumed in a different way, but the fact is, it was not. As to the organization of the general congress, we have also observed, that the people of each colony or state elected, by their own inherent and sovereign authority, in accordance with their own peculiar election law, and from among themselves (through their deputies in convention or general assembly), as many or as few commissioners or delegates, and clothed them with just such instructions and powers, as they deemed expedient; and the vote of their delegates in that body, upon each measure proposed, was given as the separate, sovereign, and independent voice of their colony or state. The voting in that congress was always by states; and not by each member as the representative of a portion of the people of the whole country. And the reason of this was, that, from the very first act of revolution, the people of each colony, province or state, had assumed to themselves the sovereign control and exclusive direction of their own affairs, and an equal voice in matters of common concern.[3]

§ 55. Allegiance.

The nature of that *allegiance* which bound the people of the several colonies to the British crown, has been already explained.[4] It was wholly of *feudal* origin, and founded solely in the SOVEREIGNTY OF GOVERNMENT—the mere *power* of one or more to enforce such laws as he or they might

[1] See Pomeroy's Constitutional Law, §§ 48, 54.

[2] The Imperial or Absolutist theory is presented and considered in another place (§§ 102 to 109).

[3] See §§ 40 to 44, *ante*.

[4] See § 30, *ante*.

choose to prescribe. Hence, when the PEOPLE had asserted and maintained *their* sovereignty, not a vestige of this *feudal* allegiance remained: although the term, *allegiance*, has since been retained, to denote the tie, or obligation, which binds the citizen to the political state, in return for that protection which the state affords to him, and the breach of which obligation, *may* involve the crime of treason. It is therefore important to know, in this connection, to whom, or to what political body, the citizen was afterwards bound by the new allegiance which followed the Revolution. This, however, is settled by the decision of the previous question, as to the body or bodies by whom the powers of government were resumed. Allegiance could only be due to the sovereign; and the sovereignty of government being exploded, no allegiance could be due to any government. But the sovereignty of the people of each colony was affirmed and established; and therefore to them,—to their sovereign will as expressed in their organic law,—allegiance was due. No one imagined that he owed allegiance to any but the colony or state of which he was a member. If any doubt was then entertained, it was settled by the continental congress; which, by a resolution of the 24th of June, 1776, declared, that 'All persons abiding within any of the United Colonies and deriving protection from the laws of the same, owed allegiance to the said laws, and were members of such colony; and that all persons passing through or making a temporary stay in any of the colonies, being entitled to the protection of the laws, during the time of such passage, visitation or temporary stay, owed, during the same, allegiance thereto.[1]

[1] Journals, II., 216. Curtis's 'History of the Constitution,' Vol. I, p. 52. The three great facts which lie at the foundation of the political history of the United States, viz., that the political sovereignty (originally vested in the parent state) was resumed by the people of each colony as a separate and sovereign body; that all political and civil authority (either of the States or of the United States) was thence derived from the sovereign and independent action of the people of each; and that the allegiance of the citizens thence became due to the people of each in their sovereign capacity as a political state; have often been

§ 56. The original union of the states.

Let us next inquire into the nature of that UNION which was first established between the States. The fact has been noticed, that down to the time of the Revolution, no

the subject of judicial recognition, as supplying the basis of correct decision, in our courts of the highest resort.

Thus in the case of Ware *et al. v.* Hylton, decided in the Supreme Court of the United States, shortly after the Revolution, and reported in 3 Dall. R. 199. In this case (see, of the Report, pp. 222 to 225), Chase, Justice, said—(the *italics* being those of the Report)—'I am of opinion that *the exclusive right of confiscating*, during the war, *all and every species of British property*, within the territorial limits of *Virginia*, resided only in the legislature of that Commonwealth. It is worthy of remembrance, that delegates and representatives were elected, by the people of the several counties and corporations of *Virginia*, to meet in *general Convention*, for the purpose of framing a NEW Government, by the authority of *the people only;* and that the said Convention met on the 6th of *May* and continued in session until the 5th of *July*, 1776; and, in virtue of their *delegated* power, established a Constitution, or form of Government, to regulate and determine by *whom*, and in *what manner*, the authority of the *people* of *Virginia* was *thereafter* to be executed. As the *people* of that country were the genuine source and foundation of *all* power that could be *rightfully* exercised within its limits; they had therefore an unquestionable *right* to grant it to whom they pleased, and under what restrictions or limitations they thought proper. *The people* of *Virginia*, by their Constitution or *fundamental* law, granted and delegated all their Supreme civil power to a *Legislature*, an *Executive*, and a *Judiciary;* the *first* to make; the *second* to execute; and the last to declare or expound, the laws of the Commonwealth. This abolition of the *Old* Government, and this establishment of a *new* one, was the highest act of power that any people can exercise. From the moment the *people* of *Virginia* exercised *this power*, all dependence on, and connection with Great Britain, absolutely and forever ceased; and no *formal* Declaration of Independence was necessary, although a decent respect for the opinions of mankind required a Declaration of the causes which impelled the separation, and was proper to give notice of the event to the nations of *Europe*. I hold it as unquestionable, that the *Legislature* of *Virginia*, established, as I have stated, by the authority of the people, was forever thereafter invested with the *supreme and sovereign power of the State*, and with authority to make any laws in their discretion, to affect the *lives*, *liberties*, and *property* of all the citizens of that Commonwealth.

'In *June*, 1776, the Convention of Virginia *formally* declared that *Virginia* was a free, sovereign and independent State; and on the 4th of *July*, 1776, following, the United States, in Congress assembled, declared the *Thirteen United Colonies* free and independent States; and that, as *such*, they had full power to levy war, conclude peace, etc. I consider this as a Declaration, not that the United Colonies *jointly*, in a

political union of the people of America had ever existed, but that which resulted from their common allegiance to, and united them in, the parent state. In seasons of dan-

*collective* capacity, were independent States, etc., but that *each* of them was a sovereign and independent State; that is, that *each* of them had a right to govern itself by its own authority and its own laws, without any control from any other power upon earth.

'Before these solemn acts of separation from the Crown of *Great Britain*, the war between *Great Britain* and the United Colonies *jointly* and *separately*, was a *civil* war; but *instantly*, on that great and ever memorable event, the war changed its *nature*, and became a PUBLIC war between *independent governments;* and immediately thereupon ALL the *rights* of *public* war (and all the other rights of an independent nation) attached to the government of *Virginia;* and all the *former political* connexion between *Great Britain* and *Virginia*, and also between their respective subjects, was totally dissolved; and not only the *two nations*, but all the subjects of each, were in a state of war; precisely as in the war between *Great Britain* and *France*. Vatt. Lib. 3, c. 18, s. 292 to 295, Lib. 3, c. 5, s. 70, 72 and 73.

'From the 4th of *July*, 1776, the American States were *de facto*, as well as *de jure*, in the possession and actual exercise of *all* the *rights* of independent governments. On the 6th of *February*, 1778, the King of France entered into a treaty of *alliance* with the *United States;* and on the 8th of *October*, 1782, a treaty of Amity and Commerce was concluded between the *United States* and the States General of the *United Provinces*. I have ever considered it as the established doctrine of the *United States*, that their independence originated from, and commenced with, the declaration of Congress, on the 4th of *July*, 1776; and that *no other period* can be fixed on for its commencement, and that all laws made by the legislatures of the several States, after the declaration of independence, were the laws of sovereign and independent governments.'

That the foregoing views of Judge Chase were in perfect accord with those of the continental congress, is conclusively shown by the second of the Articles of Confederation; which provided that, 'Each state *retains* its sovereignty, freedom and independence,' etc. See § 50, *ante*.

In McIlvaine *v.* Coxe, (2 Pet. Cond. R. 86,) decided in 1805, the Supreme Court of the United States held, that on the 4th of October, 1776, the state of New Jersey was a completely sovereign and independent state: that *citizenship* and *allegiance* belonged to the states, severally and respectively.

In Gibbons *v.* Ogden, (9 Wheat. 203; 5 Pet. Cond. R. 565,) decided by the same court in 1824, Marshall, Chief Justice, said: 'As preliminary to the very able discussion of the Constitution which we have heard from the bar, and as having some influence on its construction, reference has been made to the political situation of these States anterior to its

ger, some of the colonies had been accustomed to form associations, more or less extensive, with their immediate neighbors. A notable effort indeed was made, in 1754, to establish a common council of all, which should consist of delegates triennially chosen by the provincial assembly of each, and a president general appointed by the crown. But the project was sanctioned neither by the king nor by any of the colonial assemblies. The colonies were destined for a long time to remain, in relation to each other, separate and alien commonwealths, emulous of each other in obedience to the parent state, and in devotion to her interests, but jealous of each other's prosperity, and divided by policy, institutions, prejudice and manners.[1] Before the articles of confederation were signed, it was never considered that a citizen of one state was for any

formation. It has been said that they were Sovereign, were completely Independent, and were connected with each other only by a league. This is true.'

Again, in Martin *et al. v.* Waddell, (16 Pet. R. 410, 416,) decided by the same court in 1842, it was held, that 'When the Revolution took place, THE PEOPLE OF EACH STATE BECAME THEMSELVES SOVEREIGN;' and that 'When the people of New Jersey took possession of the reins of government, and took into their own hands the powers of sovereignty, the prerogatives and regalities which before belonged to either the crown or the parliament, became immediately and rightfully vested in the State.'

Our political history and judicial reports abound with authorities upon these points; and the CONSTITUTIONS of the several states, even at this day, are of themselves incontestible proofs, and, I trust, imperishable monuments, of the sovereignty of 'the people' of each state: which sovereignty they are designed to authoritatively express, in the most deliberate, formal and solemn manner, as the original organic law of each, in which the political state, and the government thereof, have their only foundation and support.

The same is true, indeed, of the constitution of the United States: which, as we shall hereafter see, was ordained and established by the PEOPLE of the United States, not as ONE political state, but as the *people of each* of the States respectively, acting by and for themselves as a sovereign State, and in their sovereign political capacity as such state. And, *therefore*, 'The Constitution of the United States, and every article and clause in it, is a part of the law of *every State* in the Union, and is the paramount law:' as was held by the U. S. Supreme Court in the case of Prigg *v.* The Commonwealth of Pennsylvania. (16 Pet. 628.)

[1] 1 Kent's Com. *204–5.

one purpose a citizen of another. He was, for all substantial purposes, as a foreigner to its forensic jurisprudence. If vigorous law had been enforced, perhaps he might have been deemed an *alien*, without an express provision of the state to save him.[1]

§ 57. Nature and defects of the confederation.

But when the war for independence had actually commenced, the importance of a confederacy of the colonies was felt and acknowledged by all. Articles of confederation were accordingly prepared, submitted to the several state legislatures, and after encountering considerable opposition, finally approved and sanctioned by their authority.[2]

The parties to these articles were, as we have seen, sovereign and independent political communities; each of them possessing, within itself, all the powers of legislation and government over its own citizens, which any political society can possess.[3] After stating that 'The style of this Confederacy shall be, "The United States of America," these articles expressly declare, that 'Each State retains its sovereignty, freedom and independence, and every power, jurisdiction and right, which is not by this Confederation expressly delegated to the United States in congress assembled.'[4] Hence the nature of that union of the states, which at first subsisted, is easily perceived. Whatever the powers which were delegated to it, they could be exercised only by 'The United States *in congress assembled.*' The legislative, judicial, and executive powers, were all of them lodged in a single body. Moreover, whatever the laws that were passed, or the judgments given, the executive was powerless to enforce them, either as against a particular state, or as against its individual members. Such were the grave defects of the original articles of confederation.[5] The powers which were grant-

[1] *Per* Iredell, Justice, in Penhallow *et al. v.* Doane's Adm. 3 Dall. 92.

[2] See § 50, *ante.*

[3] Curtis's Hist. of the Const. of the U. S., Vol. I, p. 142.

[4] See Art. II, under § 50, *ante.*

[5] "The great and radical vice, in the construction of the existing confederation, is in the principle of LEGISLATION for STATES or GOVERN-

ed might perhaps have proved competent for all the purposes of the union, had they been properly distributed among the departments of a well-balanced government, and been framed to act upon the citizens of the states, instead of the states themselves in their several political capacities as such. But it was left to the government of each state to enforce the laws and resolutions of congress; those even upon which depended the maintanance of the federal authority. Hence the necessity of that revision of the articles of confederation, which was accomplished by the framers of the federal constitution of 1789.

§ 58. Principles of the Revolution summed up.

It has now been seen, that the great political principles established by the American Revolution, were—first, the RIGHT of political revolution itself; at least as against any government resting, not in the common consent of the governed, but merely in its *power* to rule; secondly, the SOVEREIGNTY OF THE PEOPLE of each state; finally, the SOVEREIGNTY OF THE STATES UNITED,—the *principle* of their union being the same with that upon which the individual members of each state are united. This will be fully explained when we come to consider the nature of our present political system, as established by the state constitutions and the constitution of the United States.

In conclusion of this inquiry, it will be proper to briefly notice the change, if any, which the Revolution of 1776, caused or produced with respect to the COMMON LAW.

§ 59. Nature of the common law.

That system of law, which the earlier settlers of this

MENTS, in their CORPORATE OR COLLECTIVE CAPACITIES, and as contradistinguished from the INDIVIDUALS of whom they consist. Though this principle does not run through all the powers delegated to the union; yet it pervades and governs those on which the efficacy of the rest depends; except, as to the rule of apportionment, the United States have an indefinite direction to make requisitions for men and money; but they have no authority to raise either, by regulations extending to the individual citizens of America. The consequence is, that though in theory their resolutions concerning those objects are laws, constitutionally binding on the members of the union; yet in practice, they are mere recommendations, which the states observe or disregard at their option.' Alexander Hamilton, in No. 15 of The Federalist, pp. 67–68.

country brought with them from England, and which derives its obligation not from legislative enactments, but from universal custom and immemorial usage, and which is the fountain of American jurisprudence, is distinguished and known as the *common law*. It consists of ancient maxims and customs, embodying the wisdom and experience of ages, and forming a system that naturally keeps pace with the habits and wants of the current times.[1] Many are the names in our books by which it is distinguished. To distinguish it from *statute* law, it is sometimes called the *unwritten* law, *lex non scripta*; 'not meaning that it is at present merely *oral*, or communicated from the former ages to the present solely by word of mouth; for the monuments and evidences of our legal customs are now contained in the records of the several courts of justice, in books of reports and judicial decisions, and in the treatises of learned sages of the profession, preserved and handed down to us from the times of highest antiquity; but these parts of our law are styled *leges non scriptæ*, because their original institution and authority are not set down in writing, as acts of the legislature are, but they receive their binding power, and the force of laws, by long and immemorial usage, and by their universal reception throughout the land.'[2]

The Roman law was also divided, as well too the Grecian, into written and unwritten. Nor, says Justinian, is it an inelegant division of the law, into written and unwritten; which seems to have taken rise from the peculiar customs of the Athenians and Lacedemonians. For the Lacedemonians trusted chiefly to memory, for the preservation of their laws; but the laws of the Athenians were committed to writing.[3]

§ 60. Confirmation of the common law.

The common law of England, and also parts of the statute law, being the law of the parent state, formed the basis

[1] 1 Casey, 176.

[2] 1 Blackst. Comm. 63–64. Hale's Hist. Com. Law, 23.

[3] Just. Inst. 1, 2, 10. For a similar reason of this division in later times, see Blackst. Comm. B. I, 63—B. IV. 408.

of jurisprudence in each of the colonies, prior to the American Revolution. But political revolutions dissolve the obligation of political laws. And therefore the principles and doctrines of the common law, as well as of the statute law of England, so far as they concerned the political relations of the people of this country, were wholly annulled and swept away by the Revolution, when the colonies severally resumed to themselves the sovereignty of the political state. However, by much the greater body of the common law of England, which in no way concerned our political relations, but furnished the rule of our conduct as members of civil society, was afterward sanctioned and confirmed: either by the people themselves, in the framing and enactment of their state constitutions: or else by their state legislatures, in the exercise of powers which were delegated to them by those constitutions. Hence a general and primary criterion by which to determine whether this or that doctrine of the law of England, as held before the American Revolution, has survived that event, and remained in force as a part of our own common law. On the one hand, at least, it may safely be assumed, that the doctrines and rules of the English law, so far as they relate to the political state, the powers of government, or the political obligations of the people, form no part of the law of this country. For these, the powers of government, whether state or federal, and the political obligations of the people, are founded wholly in our written constitutions. Our doctrine of *allegiance*, for example, could not be derived from the old common law, unless we should wholly ignore the American Revolution, and still profess our subjection to the crown of Great Britain.[1]

§ 61. By and for whom confirmed.

So far as they relate to civil rights and remedies, and

[1] I do not forget that cases of *treason* (which, however, the United States could not punish) were tried in this country, before our constitutional governments were fairly established, seemingly upon authority of our common law, but in reality, by no other right than that of revolution. It was never questioned that treason could be committed against each state, or that each state as a sovereign community had power to define and punish the offence.

the definition and punishment of crimes and misdemeanors, the laws of the colonies in force before the Revolution, including not only the common law of England but also English statutes in amendment thereof,[1] were generally retained and confirmed by authority of the people, as forming the basis of the common law—of the SEVERAL STATES; we cannot say—of the UNITED STATES: because, first; that law alone which is *common* to the United States, but which is not called 'the common law,' is founded solely in the organic law of the union, the federal constitution, and is wholly composed of that constitution and the laws enacted and treaties made in pursuance thereof: secondly; neither by the articles of confederation, nor by the present constitution of the union, was the common law ever adopted or confirmed, either as the law of the several states, or as the law of the United States; nor was ever the government of the United States, or any of its departments, legislative, judicial, or executive, invested with power to adopt, confirm, or administer the same.[2]

§ 62. Its peculiar genius and excellence.

The great characteristic which distinguishes our common law from all other laws and systems of law, and in which alone consists its peculiar genius and excellence, is, not that its rules are those of eternal and immutable justice (for rules of this nature can never be peculiar to any particular body of law), but that it is founded in the principle that a usage or custom, maxim or statute, so obviously reasonable, convenient and just, as to have been sanctioned

[1] See 1 Bish. Crim. Law, p. 15, note 4.

[2] If there were any such law, as 'the common law of the United States,' we should wish to inquire, with Mr. Justice Chase (in 2 Dall. 395), 'Is it the common law entire, as it exists in England; or modified, as it exists in some of the states; and of the various modifications, which are we to select, the system of Georgia or New Hampshire, of Pennsylvania or Connecticut?' It is, however, a settled point, that the courts of the United States are clothed with no common law jurisdiction whatever, and that all the powers they possess must be referred to the grants of the constitution, or to these grants and laws of congress passed in pursuance thereof. Pomeroy's Constitutional Law, §§ 739 and 759, and cases there cited.

and approved by every man's reason and experience, and retained and continued from generation to generation, though the record and history of its origin have long been lost, shall be and remain of force and effect as part of the law of the land. This is the great and fundamental principle of our common law: a principle which, attracting to itself the wisdom and experience of each successive age of civilized man, descends from generation to generation, as an ancient inheritance, adorned and improved from the remotest times.

## (2 *d*) OF POLITICAL SOVEREIGNTY: AND HEREIN (1 *e a*) OF THE LEGISLATIVE POWER (1 *f a*) OF THE PEOPLE.

§ 69. Original principle of sovereignty.

THE PRINCIPLE OF SOVEREIGNTY, when traced to its original source, is found, as we have seen, in THE NATURAL RIGHT OF SELF-GOVERNMENT: and this we have defined to be, in the case of an individual, the right of a man to govern himself, in relation to matters peculiarly and immediately affecting himself, according to his judgment of what is right; in relation to things in which others with him are equally concerned, by his agreements with them; in the case of a people, the right of that people to govern themselves, in their relations to each other, by laws expressive of their common will and consent; in their relations to other political states, by their compacts or treaties with them.

Society is naturally and necessarily formed, not of a single consolidated mass of flesh and blood, but of many and different natural individuals, each of whom has his own distinct organization and separate existence, and consequently must be considered both in relation to himself, and in relation to others, his equals. The duties and rights of each must therefore be distinguished, as either internal and absolute, or external and relative; and this in accord-

ance with that immutable boundary line which nature herself has established (but which she has left for man to perceive and define), between the particular jurisdiction of each individual, within the domain of his absolute rights, and the general and common jurisdiction of all the members of society, within the sphere of their relative rights. To make this great truth plain, was the principal object of a former part of our work. Our business here is to apply it correctly to political states.

§ 70. Source and nature of political sovereignty.

Now when a society or people, in the exercise of their natural sovereignty or right of self-government, have agreed and united upon an organic law for the common government of all, and so establish their political state, there results from their union a *political power;* and this political power, as thence determined and vested by their organic law, is what we mean by the *political sovereignty.*

A clear understanding of the difference between the natural and the political sovereignty, is of the first importance in the study of our system of organic law.

Natural sovereignty is that which belongs to ALL MANKIND, without distinction, and to no one man, nation, people, or body of men, more than to another. Political sovereignty is that which results from the institution of political society, which is, therefore, as various in forms as the constitutions of political states, and is vested in each political state, according to its constitution, exclusively for itself alone, as a separate sovereign community.

On primary grounds, all men being equal in right, the opinion or judgment of one is of equal authority with that of any other; and therefore all are equally entitled to decide upon matters of common concern. In this consists the natural sovereignty of men as members of society (the original anarchy of the state of nature). But the very institution of the political state, must put an end to that state of things. A political union of individuals is clearly impossible unless on the basis of an organic law which determines and fixes the qualifications of the members who are to exercise the political power, and which

therefore discriminates between them concerning their capacity for political rights. The natural sovereignty of human society can find expression only in the institution of political states. It cannot cease to exist, so long as man himself exists, but as finding its only expression in and through such organizations, it undergoes a change of character, and becomes political sovereignty. As such, in all free states, it resides in those who are clothed with the right of suffrage by the organic law. These act throughout by their own authority, and acknowledge no superior; whether they act in the name of 'the people,' in the name of the voters or electors, or in that of the state. In fact, not all mankind are equally competent to give expression to the natural sovereignty. Whoever has ears to hear and a tongue to speak, will exert, as of course, his share of influence on all the deliberations of the sovereign court of last resort. But the sovereign right to give the legitimate and all-controlling expression to the natural sovereignty, can only reside in such as possess the qualifications required by the organic law or compact of society. Upon these, therefore, the preservation and maintenance of our liberties must finally depend.

In the exercise of their *natural* sovereignty, all mankind were originally free, and still are free, to form themselves into a single political state, or into a variety of independent communities. So of the people of the colonies at the time of the Revolution. In resuming to themselves the powers of government, they could have wholly abandoned their several organizations as separate political communities or states, and, acting as one united people and in virtue of a common election law, have formed themselves into ONE political state. So yet the people of this country may do, in virtue of their natural, original and inherent sovereignty. But what they may do in virtue of their *political* sovereignty, can only be determined by reference to their several political constitutions.

§ 71. The supreme power.

It is a generally received political maxim, that in every community or state, there must somewhere exist an abso-

lute, unlimited, and uncontrollable power, in which the *jura summi imperii* or rights of sovereignty reside; and of our own political law, it is the primary and fundamental doctrine, that this unlimited and uncontrollable power is in 'THE PEOPLE' themselves; whose sovereign will, as from time to time expressed in their written constitutions, is the only established criterion of right and wrong, to which all men alike, both governing and governed, are in all things bound to conform.

It is therefore only of this power of 'the people' that we in this country can affirm, what Coke and after him Blackstone have said, of the power of the British Parliament; that it is so transcendent and absolute, that it cannot be confined, either for causes or persons, within any bounds: that it hath sovereign and uncontrollable authority, in the making, confirming, enlarging, restraining, abrogating, repealing, reviving, and expounding of laws, concerning matters of all possible denominations, ecclesiastical or temporal, civil, military, maritime, or criminal.[1] But of this, the natural, inherent, and uncontrollable power of the people, it may truly be said, that it can regulate or new-model the form of government itself; as in fact it did by the Revolution of 1776: it can alter the laws relating to religion and religious worship; as also it formerly did in some of the states: it can change and create afresh even the organic law of the union; as it did in 1789, upon the revision of the articles of confederation and establishment of the constitution of the United States. It can, in short, do everything that is not naturally impossible, and what it does, no other authority on earth can undo.[2]

There is, however, a natural limit to the will of mere majorities, as will clearly appear.

§ 72. Distribution of the subject.

The supreme power of the state, is of a *three*-fold nature and character: *legislative, judicial,* and *executive;* its office being, to make and prescribe, expound and apply, and maintain and enforce, the law of the land.

[1] See 4 Inst. 36; 1 Bl. Com. 160, 161.

[2] Compare 1 Blackst. Com. 161.

The *power to make and prescribe* the law, is also, in our system, of *three* distinct kinds: namely, first, that of the PEOPLE themselves, in the exercise of their paramount sovereignty; secondly, that of the STATE LEGISLATURES respectively; and thirdly, that of the FEDERAL LEGISLATURE: the two last named, being representative and subordinate, as existing only in virtue of the first.[1]

Our attention will here be confined to THE LEGISLATIVE POWER OF THE PEOPLE. And this, I conceive, should be considered in relation to its legislative acts; that is to say, in relation to, first, THE ESTABLISHMENT OF THE STATE CONSTI-

[1] A distinguished law-writer has said, 'It has never been questioned that the American legislatures have the same unlimited power in regard to legislation which resides in the British Parliament, except where they are restrained by written constitutions.' (See Am. Law Reg. for July, 1868, p. 521.) This is true in the sense in which intended. But it is not understood that our constitutions, being organic laws, were simply designed to *restrain* powers. The purpose of our organic laws, is to *originate and delegate* powers. Strictly speaking, there is no essential resemblance between the *powers* of the British Parliament, and those of any American Legislature. The only power in this country, equal to that of the British Legislature, is the inherent, inalienable, and paramount sovereignty of 'the people:' which could never be confided to any legislature, without a total subversion of the very foundation of our system. The British constitution is the *will of Parliament*. 'In England, the authority of Parliament runs without limits, and rises above control. It is difficult to say what the constitution of England is; it lies entirely at the mercy of Parliament; it bends to every governmental exigency; it varies and is blown about by every breeze of legislative humor or political caprice. In America, the case is widely different. Every state in the union has its constitution reduced to written exactitude and precision. What is a *constitution?* It is the form of government delineated by the mighty hand of the people, in which certain first principles or fundamental laws are established. The constitution is certain and fixed; it contains the paramount will of the people, and is the supreme law of the land; it is paramount to the power of the legislature, and can be revoked or altered only by the authority that made it. The life-giving principle and the death-doing stroke must proceed from the same hand. What are the *legislatures?* Creatures of the constitutions; they owe their existence to the constitutions; they derive their powers from the constitutions; the constitutions are their commissions; and therefore all their acts must be conformable to them, or else they will be void. A constitution is the work of the people themselves, in their original, sovereign, and unlimited capacity. A law is the work or will of the legislature, in their derivative and subordinate capacity. The

TUTIONS; secondly, THE ESTABLISHMENT OF THE CONSTITUTION OF THE UNITED STATES; and thirdly, THE AMERICAN POLITICAL SYSTEM AS SO CONSTITUTED. First, then,

## (19 *a*) OF THE ESTABLISHMENT OF THE STATE CONSTITUTIONS.

§ 78. Nature of state constitutions.

By a STATE CONSTITUTION, we mean an ORGANIC LAW, ordained and established by the SOVEREIGN AUTHORITY, or supreme power, of a state, for the government thereof. This organic law, however, being founded in COMMON CONSENT, must partake of the nature of a SOCIAL COMPACT, 'by which,' in the language of the constitution of Massachusetts, 'the whole people covenants with each citizen, and each citizen with the whole people, that all shall be governed by certain laws for the common good;' or rather, by such their constitution.

Every political state, indeed, is founded (theoretically at least) in what is often called 'the original compact of society.' Of which Blackstone speaks in these words: 'And this is what we mean by the original compact of society; which, though perhaps in no instance it has ever been formally expressed at the first institution of a state, yet in nature and reason must always be understood and implied, in the very act of associating together: namely, that the whole should protect all its parts, and that every part should pay obedience to the will of the whole, or, in other words, that the community should guard the right of each individual member, and that (in return for this protection) each individual should submit to the laws of the community; without which submission of all it was impossible that protection should be certainly extended to any.'[1] Which passage affords us occasion to remark, that

one is the work of the creator, and the other, of the creature. The constitution fixes limits to the exercise of legislative authority, and prescribes the orbit within which it must move. In short, the constitution is the sun of the political system, around which, the legislative, executive, and judicial bodies, must revolve.' (*Per* Justice Patterson, 2 Dall. R. 307 *& seq.*)

[1] 1 Blackst. Com. 47–48.

down to the time when Blackstone wrote,[1] no one instance of a political state originally founded in a written constitution of government, ordained and established by the people themselves, had ever been known. It has frequently been remarked, 'that it seems to have been reserved to the people of this country to decide, by their conduct and example, the important question, whether societies of men are really capable or not, of establishing good government from reflection and choice, or whether they are forever destined to depend for their political constitutions, on accident and force.'[2]

§ 74. Their original formation.

In reviewing the political measures of the several colonies, by which they resumed the powers of government,[3] we noticed that prior to the declaration of independence, some of the states, New Jersey, Virginia, and South Carolina, had actually formed and established their state constitutions. So, we may add, had Connecticut and Rhode Island: whose charters (reserving nothing to the crown but a forfeited allegiance) were severally retained by them as their original codes of organic law.[4] Before the close of the year, 1776, Pennsylvania, Delaware, Maryland, and North Carolina had also completed the work of reorganization, and established their constitutions; New York and Georgia following in 1777; Massachusetts, in 1780, and New Hampshire in 1784.[5] Besides these, the original thirteen states, by whom the federal union was formed (as we have seen), and afterward dissolved and re-formed (as we shall see), twenty-four other political communities have since emerged from a sort of dependent or colonial condition, framed for themselves their several state constitutions, and thence (in conformity with a provision of the federal constitution) been severally admitted as members

[1] His 'Commentaries' were completed in 1769.

[2] The Federalist, No. 1. [3] § 43, *ante*. [4] See § 27, *ante*.

[5] It seems that as early as the 15th of June, 1776, New Hampshire made a sort of declaration of independence, and, in December of the same year, framed a temporary form of government. But the first regular constitution of that state was adopted in 1784; and this was revised in convention in 1792.

of the union on an equal footing with the original states. The union is therefore now composed of thirty-seven co-equal and co-independent members; each of whom is internally governed in accordance with its own organic law.

§ 75. Their necessity, object and character.

Vitally essential to the existence of every political community, as well as to each of the individual members of which it is composed, is the sovereign right of internal self-government. Nor can a republic or confederacy of co-equal communities, any more than a natural society of free individuals, continue to exist, if this right be endangered, obstructed or rendered insecure. It was therefore necessary for each and every state of the union, to provide and establish a political constitution of its own, an organic law, which, as expressive of its sovereign will, should furnish the ultimate rule of right in the relations of the state to its several members, and the relations of these to one another, as citizens of the state.

The prominent features of the state constitutions, should here be noticed; and these I shall endeavor to exhibit by means of a general form, which may serve to convey an idea of the objects and character of each.

## GENERAL IDEA AND FORM OF A STATE CONSTITUTION.

### PREAMBLE.

THE end of the institution, maintenance, and administration of government, is to secure the existence of the body politic, to protect it, and to furnish the individuals who compose it with the power of enjoying, in safety and tranquility, their natural rights and the blessings of life: and whenever these great objects are not obtained, the people have a right to alter the government, and to take measures necessary for their safety, prosperity, and happiness.

The body politic is formed by a voluntary association of individuals. It is a social compact, by which the whole people covenants with each citizen, and each citizen with

the whole people, that all shall be governed by certain laws for the common good. It is the duty of the people, therefore, in framing a constitution of government, to provide for an equitable mode of making laws, as well as for an impartial interpretation and a faithful execution of them; that every man may, at all times, find his security in them.

WE, therefore, THE PEOPLE of ————, acknowledging with grateful hearts the goodness of the Great Legislator of the Universe, in affording us, in the course of his Providence, an opportunity, deliberately and peaceably, without fraud, violence, or surprise, of entering into an original, explicit, and solemn compact with each other; and of forming a new Constitution of civil government, for ourselves and posterity; and devoutly imploring his direction in so interesting a design, do agree upon, ordain, and establish, the following declaration of rights and frame of government, as the Constitution of the Commonwealth of ———.[1]

DECLARATION OR BILL OF RIGHTS.

1. All men are born free and equal, and have certain natural, inherent, and inalienable rights: among which may be reckoned, the right of enjoying and defending their lives and liberties; that of acquiring, possessing, and protecting property; and that of seeking and obtaining happiness.[2]

2. All power is inherent in the people. All free governments are founded on their authority, and instituted

[1] This Preamble, of the constitution of Massachusetts, is fuller, and perhaps more befitting the occasion, than any other. The recognition of the Supreme Being, cannot be objected to as sectarian, and must, I think, seem eminently proper; though in all forms excluded from many of our state constitutions, as well as from the constitution of the United States.

[2] Const. Mass. Pt. I, Art. 1. This is substantially the common language of all our state constitutions—borrowed from that of the Declaration of Independence, or, it may be, from that of the Virginia Bill of Rights of June 12, 1776, prefixed to the constitution of that commonwealth.

for their benefit: they therefore have, at all times, an inalienable and indefeasible right to institute government, and to alter, reform, or totally change the same, in such manner as they may think proper.[1]

3. The people of this commonwealth have the sole and exclusive right of governing themselves, as a free, sovereign, and independent state: and do, and forever hereafter shall, exercise and enjoy every power, jurisdiction, and right, which is not, or may not hereafter be, by them expressly delegated to the United States of America.[2]

4. All power residing originally in, and being derived from the people, all the magistrates and officers of government, are their substitutes and agents, and are at all times accountable to them.[3]

5. In order to prevent such persons as may be invested with authority from becoming oppressors, the people have a right, at such periods and in such manner as they shall establish by the frame of government, to cause their public officers to return to private life, and to fill up vacant places by certain and regular elections and appointments.[4]

6. Elections shall be free and equal.[5]

7. Trial by jury shall be as heretofore, and the right thereof remain inviolate.[6]

8. The free communication of thoughts and opinions is one of the invaluable rights of man; and every citizen may freely speak, write, and publish his sentiments, on any subject, being responsible for the abuse of this liberty. No law shall ever be passed regulating or restraining the freedom of the press; and, in prosecutions for any publication respecting the official conduct of men in public

[1] All the state constitutions are substantially at one in this doctrine. It is perhaps remarkable, that not one of them says, *in the manner provided by this constitution.*

[2] Const. Mass. Pt. 1, 4; New Hamp. Pt. 1, 7. Clauses clearly presupposing and implying the same are common to all.

[3] Const. N. H. Pt. 1, 8; Mass. Pt. 1, 5; Virginia Bill of Rights of June 12, '76, 2. In one form or other, common to all.

[4] Const. Mass. Pt. 1, 8.

[5] Universally declared.

[6] Substantially declared by all.

office, or the qualifications of those who are candidates for the suffrages of the people, or where the matter published is proper for public information, the truth thereof may be given in evidence; and in all indictments for libels, the jury, after having received the direction of the court, shall have a right to determine, at their discretion, the law and the fact.[1]

9. The freedom of deliberation, speech, and debate, in either house of the legislature, is so essential to the rights of the people, that it cannot be the foundation of any action, complaint, or prosecution, in any other court or place whatsoever.[2]

10. Neither slavery nor involuntary servitude shall exist in this state; except as a punishment for crime whereof a person shall have been duly convicted.[3]

11. Such parts of the common law, and of the acts of the legislature of the colony, as together did form the law thereof on the nineteenth day of April, one thousand seven hundred and seventy-five, and the resolutions of the congress of the colony, and of the convention of the state, in force on the twentieth day of April, one thousand seven hundred and seventy-seven, which have not since expired, or been repealed or altered; and such acts of the legislature of this state as are now in force, shall be and continue the law of this state, subject to such alterations as the legislature shall make concerning the same. But all such parts of the common law, and such of the said acts, or parts thereof, as are repugnant to this Constitution, are hereby abrogated.[4]

12. The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches

[1] Const. Maine, Art. I, 4; R. I. Art. I, 20; Conn. Art. I, 5, 6, 7; N. Y. Art. I, 8; N. J. Art. I, 5; Penna. Art. IX, 7; Del. Art. I, 5. Freedom of speech and of the press is fully secured by all the constitutions; but not so fully in some others as in these.

[2] Const. N. H. Pt. I, 30; Verm. Ch. I, 14; Mass. Pt. I, 21. The doctrine is general throughout the states.

[3] In substance, universal.

[4] Const. N. Y. Art. I, 17. See Const. Md. Art. III, Declaration of Rights. Generally omitted and provided for by statute.

and seizures, shall not be violated; and no warrant to search any place, or to seize any person or things, shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person, papers, or things to be seized.[1]

13. In all criminal prosecutions, the accused hath a right to be heard by himself and his counsel, to demand the nature and cause of the accusation against him, to meet the witnesses face to face, to have compulsory process for obtaining witnesses in his favor, and in prosecutions by indictment or information, to a speedy trial by an impartial jury of twelve men of his vicinage.[2]

14. No one shall be compelled to give evidence against himself; or be deprived of his life, liberty or property, unless by the judgment of his peers or the law of the land.[3]

15. No person shall for any indictable offence, be proceeded against criminally by information; except in cases arising in the land and naval forces, or in the militia when in actual service in time of war or public danger; or by leave of the court, for oppression and misdemeanor in office.[4]

16. No person shall be held to answer for a criminal offence, unless on the presentment or indictment of a grand jury, except in cases of impeachment, or in cases cognizable by justices of the peace, or arising in the army or navy, or in the militia, when in actual service in time of war or public danger.[5]

17. No person for the same offence shall be twice put in jeopardy of life or limb.[6]

18. All prisoners shall, before conviction, be bailable by sufficient sureties, except for offences punishable by death,

[1] Contained in all the constitutions.

[2] Const. Penna. Art. IX, 9; Virginia Bill of Rights of June 12, '76 Much the same language is used in all.

[3] The same in all.

[4] Const. Penna. IX, 10.

[5] Substantially the same in all.

[6] The same in all.

or imprisonment for life, where the proof is evident, or the presumption great.[1]

19. Every man being presumed innocent until he is pronounced guilty by the law, no act of severity which is not necessary to secure an accused person, shall be permitted.[2]

20. Excessive bail shall not be required, nor excessive fines imposed, nor cruel nor unusual punishments inflicted.[3]

21. No person shall be imprisoned for debt in any action, or on any judgment, founded upon contract, unless in cases of fraud.[4]

22. All courts shall be open, and every man, for an injury done him in his person, property, or reputation, shall have remedy by due course of law, and right and justice administered, without sale, denial, or delay.[5]

23. Private property shall not be taken for public use without just compensation.[6]

24. No power of suspending laws shall be exercised, unless by the legislature, or its authority.[7]

25. The privilege of the writ of *habeas corpus* shall not be suspended, unless when, in cases of rebellion or invasion, the public safety may require it.[8]

26. No commission of oyer and terminer or jail delivery shall be issued.[9]

27. No subsidy, charge, tax, import or duties, shall be established, fixed, laid, or levied, under any pretext what-

[1] The words '*or imprisonment for life*' are, in many of the constitutions, omitted. Upon the abolition of capital punishment, *murder* might thus become a *bailable* offence in some of the states. The provision, in other respects, is universal.

[2] Quite general but not universal.

[3] Universal.

[4] Found in some of the constitutions, but more generally provided by statute law.

[5] A very general provision; but often omitted.

[6] Universal.

[7] Substantially the same in all.

[8] Universal. In some states, *nor without the authority of the legislature:* which I presume is *implied* when not expressed.

[9] Const. Penna. IX, 15.

ever, without the consent of the people, or their representatives in the legislature.[1]

28. The right of the people to bear arms, in defence of themselves and the state, shall never be questioned.[2]

29. A well regulated militia, composed of the body of the people, trained to arms, is the proper, natural and safe defence of a free state.[3] Standing armies being dangerous to liberty, no standing army shall be kept up without the consent of the legislature; and the military shall, in all cases, and at all times, be in strict subordination to the civil power.[4]

30. No soldier shall, in time of peace, be quartered in any house, without the consent of the owner, nor in time of war, but in a manner to be prescribed by law.[5]

31. Treason against the state shall consist only in levying war against it, or in adhering to its enemies, giving them aid and comfort. No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court. Nor shall any person be attainted of treason or felony by the legislature: nor shall any attainder work corruption of blood, nor, except during the life of the offender, forfeiture of estate to the commonwealth.[6]

32. The people have a right to assemble in an orderly and peaceable manner, to consult upon the common good, give instructions to their representatives, and to apply to those invested with authority for redress of grievances, or for other proper purposes, by petition, address, or remonstrance.[7]

33. No title of nobility, hereditary distinction, privilege,

[1] This provision is substantially universal, though not so fully and formally expressed in all the constitutions.

[2] A very common but not universal provision.

[3] Virginia Bill of Rights of June 12, '76.

[4] Substantially universal.

[5] Universal.

[6] These propositions, express the supreme law of most if not all the states, respecting treason.

[7] In substance universal.

honor, or emolument, shall ever be granted or confirmed.[1]

84. Emigration from the state shall not be prohibited.[2]

85. Among the natural rights, some are in their very nature inalienable; because no equivalent can be given or received for them. Of this kind, are the *rights of conscience.*[3] Religion, or the duty which we owe to our Creator, and the manner of discharging it, can be directed only by reason and conviction, not by force or violence; and therefore all men are equally entitled to the free exercise of religion according to the dictates of conscience; and it is the mutual duty of all to practice Christian forbearance, love and charity, towards each other.[4]

No one shall be harmed, molested, or restrained, in his person, liberty, or estate, for worshiping God in the manner and season agreeable to his conscience, or for or on account of his religious professions, opinions or sentiments, provided he does not disturb the public peace, nor obstruct others in their religious worship, nor justify practices inconsistent with the general law of the state. Nor shall the civil or political rights, privileges, or capacities, of any person or persons, be diminished, enlarged, or affected, by reason of any opinion upon a matter of religion. Nor shall any one be compelled to attend, erect, or support, any place of worship, or to maintain any ministry against his own consent.[5]

86. A frequent recurrence to fundamental principles, and a firm adherence to justice, moderation, temperance, industry, frugality and all the social virtues, are indispensably necessary to preserve the blessings of liberty and good government: the people ought, therefore, to pay particular attention to these points, in the choice of offi-

[1] Universal.

[2] Common but not universal.

[3] Const. N. H.

[4] Virginia Bill of Rights of June 12, '76.

[5] In some of the states, a man is incompetent to be a witness or a juror if he does not believe in the existence of God as the Supreme Judge of the world and the dispenser of rewards and punishments. In other respects, the language of the several constitutions is nearly the same with that of the text.

cers and representatives; and they have a right to require of their law-givers and magistrates an exact and constant observance of them in making and executing such laws as are necessary for the good government of the state.[1] And in order effectually to secure the religious and political freedom established by our venerable ancestors, and to preserve the same for our posterity, we do declare that the essential and unquestionable rights and principles herein mentioned, shall be established, maintained, and preserved, and shall be of paramount obligation in all legislative, judicial, and executive proceedings.[2]

BOUNDARIES AND DOMAIN.

37. The property of the soil being one of the essential rights of the collective body of the people, it is necessary in order to avoid future disputes, that the limits of this state should be ascertained with precision: and this convention,—composed of the immediate representatives of the people, chosen by them to assert their rights, and to revise the powers of government,—doth assert and declare that the boundaries of this state rightfully are and shall be as follows:———.[3]

38. The people of this state, in their right of sovereignty, are deemed to possess the original and ultimate property in and to all the lands within the jurisdiction of the state; and all lands the title to which shall fail from a defect of heirs, shall revert or escheat to the people.[4]

39. All lands within this state are declared to be allodial, so that, subject only to the liability to escheat, the entire

[1] Const. Mass. Pt. 1, 18; Verm. Ch. 1, 18; N. H. Pt. 1, 38; Virginia Bill of Rights of June 12, 1776.

[2] Const. R. I. Art. 1. It is usually declared, that everything in the Bill or Declaration of Rights, is excepted and reserved out of the general powers of government, and shall forever remain inviolate; or else, that this enumeration of rights shall not be construed to impair or deny others retained by the people.

[3] The article relating to *boundaries*, was not inserted in all the constitutions of the original states. It forms, however, an important feature of those of the new states, and ought, perhaps, to appear in every constitution.

[4] Const. N. Y. Art. 1, 11.

and absolute property is vested in the owners according to the nature of their respective estates.[1]

ELECTORS.

40. Every male citizen of this state, or of the United States, of the age of twenty-one years or upwards, who shall have been a resident in this state one year, and of the county in which he offers to vote five months, next before the election, shall be entitled to vote for all officers that now are or hereafter may be elective by the people:[2] *Provided*, however, that no person in the military, naval, or marine service of the United States, shall be considered a resident in this state, by being stationed in any garrison, barrack, or military or naval place or station within this state; and no pauper, idiot, insane person, or person convicted of a crime which excludes him from being a witness, unless pardoned and restored by law to the right of suffrage, shall enjoy the right of an elector.[3]

41. Electors shall in all cases, except treason, felony, or breach of the peace, be privileged from arrest during their attendance at elections, and in going to and returning from the same.[4]

DISTRIBUTION OF THE POWERS OF GOVERNMENT.

42. The government of this state shall consist of three distinct branches—the legislative, judicial, and executive; and no person or persons belonging to, or constituting one of these branches, shall exercise any of the powers properly belonging to either of the others, except as herein expressly provided.[5]

[1] Const. N. Y. Art. I, 13.

[2] Each state makes its own regulations as to age, time of residence, pre-payment of taxes, property qualifications, etc. And these regulations are so many and various that I shall not here attempt to compile them; but refer the reader to the several constitutions themselves.

[3] See Const. N. J. Art. II.; N. Y. Art. II.;—similar provisions are common.

[4] Very nearly universal.

[5] This division is made by all the constitutions.

THE LEGISLATIVE POWER.

43. The legislative power of the government of this state[1] shall be vested in a Legislature, which shall consist of a Senate and House of Representatives.[2]

44. Senators and representatives shall be elected by and from among the qualified electors in each of the several counties of this state.[3]

45. Each house shall be the judge of the elections, returns, and qualifications of its own members; and a majority of each shall constitute a quorum to do business; but a smaller number may adjourn from day to day, and may be authorized to compel the attendance of absent members, in such manner, and under such penalties as each house may provide.

46. Each house shall choose its own officers, determine the rules of its proceedings, punish its members for disorderly behaviour, and may, with the concurrence of two-thirds, expel a member.

47. Each house shall keep a journal of its proceedings, and from time to time publish the same; and the yeas and

[1] The common form is—'The legislative power of this state shall,' etc. In one or two instances we have—'The supreme legislative power within this state,' etc.: which is so far from expressing the truth, that it conveys a false idea: for when we consider, that in every constitution, the people reserve to themselves that paramount, supreme and uncontrollable legislative power, by which they ordain and establish, and change or abolish, their organic law, and that all other legislative bodies must legislate subordinately thereto, it is clearly perceived that not even 'the legislative power of the state' is in any case vested in any representative legislature.

[2] This clause is expressed in a varity of forms; but always to the same purpose,—the division of the legislative body into two distinct branches; the one called the *Senate;* the other, the *House of Representatives*, the *Assembly*, the *General Assembly*, the *House of Delegates*, or the *House of Commons;* and both together styled the *General Assembly*, the *Legislature*, the *General Court*, the *Senate and General Assembly*, or the *Senate and Assembly*.

[3] The number and apportionment of senators and representatives, their several qualifications for and terms of office, and the times of their election, are generally fixed by the constitution. But in these particulars, hardly any two of the constitutions agree; and each must be consulted as occasion may require.

nays of the members of either house, on any question, shall, at the desire of one-fifth of those present, be entered on the journal.

48. Neither house, during the session of the legislature, shall, without the consent of the other, adjourn for more than three days, nor to any other place than that in which the two houses shall be sitting.[1]

49. The legislature shall have power to make all such laws and ordinances as they shall deem proper; provided they be not repugnant to this constitution.[2]

50. All bills and joint resolutions shall be read three times in each house before the final passage thereof; and no bill or joint resolution shall pass unless there be a majority of all the members of each body personally present and agreeing thereto; and the yeas and nays of the members voting on such final passage shall be entered on the journals.[3]

51. To avoid improper influences which may result from intermixing in one and the same act such things as have no proper relation to each other, every law shall embrace but one object, and that shall be expressed in the title.[4]

52. No act shall ever be revised or amended by mere reference to its title; but the revised act or amended section shall be set forth and published at full length.[5]

53. The legislature shall not pass any *ex post facto* law, or

[1] Nos. 45, 46, 47 and 48, are (with one or two trivial exceptions) substantially the same in all the constitutions.

[2] See Const. Geo. (of 1798—1839) Art. I, 22; Mass. Pt. II, Ch. I, Sec. 1, Art. 3–4; New Hamp. Pt. II; Me. IV, III, 1. The power to make laws, vested in each state-legislature, is a *general* power, to be exercised at the *discretion* of the legislature, subject to the checks, restraints and limitations, contained in the constitution. The subjects over which it extends, are not enumerated and specified, as they are in the federal constitution. In the state constitutions, we look only for express limitations; in the federal constitution, only for express and specific grants, of legislative power.

[3] Const. N. J. Art. IV, § 4, 6. Provisions more or less stringent, and designed as checks upon hasty legislation, are common to all.

[4] A very common but not universal provision.

[5] Also common but not universal.

law impairing the obligation of contracts,[1] or depriving a party of any remedy for enforcing a contract, which existed when the contract was made.[2]

54. No divorce shall be granted by the legislature.[3]

55. Every bill which shall have passed both houses, shall, before it become a law, be presented to the governor. If he approve, he shall sign it; but if he shall not approve, he shall return it with his objections to the house in which it shall have originated, who shall enter the objections at large upon their journal, and proceed to reconsider it. If, after such reconsideration, two-thirds of that house shall agree to pass the bill, it shall be sent with the objections to the other house, by which likewise it shall be reconsidered, and if approved by two-thirds of that house, it shall be a law. But in such cases the votes of both houses shall be determined by yeas and nays, and the names of the persons voting for or against the bill shall be entered on the journals of each house respectively. If any bill shall not be returned by the governor within ten days (Sundays excepted) after it shall have been presented to him, it shall be a law in like manner as if he had signed it, unless the legislature, by their adjournment, prevented its return, in which case it shall be a law, unless sent back within three days after their next meeting.[4]

56. The house of representatives shall have the sole power of impeachment; but the senate shall have the sole power to try all impeachments; and when sitting for that purpose, they shall be on oath or affirmation. When the governor is tried, the chief justice shall preside; and no person shall be convicted without the concurrence of two-thirds of the members present.

57. Judgment in case of impeachment shall not extend further than to removal from office, and disqualification to hold and enjoy any office of honor, trust, or profit, under

[1] Universal.

[2] Const. N. J. Art. IV, Sec. VII—3.

[3] Common to many of the constitutions; qualified in some, and omitted in others.

[4] This or a similar provision will be found in all.

this state; but the party convicted shall, nevertheless, be liable and subject to indictment, trial, judgment, and punishment according to law.[1]

58. The senators and representatives shall receive a compensation for their services, to be ascertained by law, and paid out of the treasury of the state. They shall in all cases except treason, felony, and breach of the peace, be privileged from arrest during their attendance at the session of their respective houses, and in going to and returning from the same; and for any speech or debate in either house, they shall not be questioned in any other place.[2]

59. No senator or representative shall, during the time for which he was elected, be appointed to any civil office of profit under the authority of this state, which shall have been created, or the emoluments whereof shall have been increased, during such time; and no person holding any office under this state, or under any other government or state, shall be a member of either house during his continuance in office.[3]

60. No money shall be drawn from the treasury but in consequence of appropriations made by law. And an accurate statement of the receipts and expenditures of the public moneys shall be attached to and published with the laws at every regular session of the legislature.[4]

### THE JUDICIAL POWER.

61. The judicial power of this state shall be vested in one supreme court, in county courts, justices of the peace, and in such other courts inferior to the supreme court, as the legislature may from time to time establish by law.[5]

### THE EXECUTIVE POWER.

62. The supreme executive power shall be vested in a

[1] The several provisions relating to impeachment, and to what officers shall be liable thereto, are not uniformly the same in all the constitutions.

[2] Substantially the same in all.

[3] Variously qualified in the different constitutions.

[4] Common to most if not all.

[5] Concerning the judicial power, little or nothing can be extracted from the several state constitutions which is common to all alike.

governor;[1] who shall be elected by and from among the qualified electors of this state.[2]

63. The governor of this state shall take care that the laws be faithfully executed. He shall be commander-in-chief of the army and navy of this state; and of the militia, except when called into the actual service of the United States;[3] and shall have full power, by himself or by any chief commander, or other officer or officers, from time to time, to train, instruct, exercise, and govern the militia and navy; and for the special defence and safety of this state, to assemble in martial array, and put in warlike posture, the inhabitants thereof, and to lead and conduct them, and with them encounter, repulse, repel, resist, and pursue, by force of arms, as well by sea as by land, within and without the limits of this state; and also to kill, slay, destroy if necessary, and conquer by all fitting ways, enterprise, and means, all and every such person and persons as shall at any time hereafter in a hostile manner attempt or enterprise the destruction, invasion, detriment, or annoyance of this state; and to use and exercise over the army and navy, and over the militia in actual service, the law martial in time of war, invasion, and also in rebellion, declared by the legislature to exist, as occasion shall necessarily require. And surprise, by all ways and means whatsoever, all and every such person or persons, with their ships, arms, ammunition, and other goods, as shall in a hostile manner invade, or attempt the invading, conquering, or annoying this state: And, in fine, the governor is hereby intrusted with all other powers incident to the office of captain-general and commander-in-chief, and admiral, to be exercised agreeably to the rules and regulations of the constitution and the laws of the land: Provided, that the governor shall not at any time hereafter, by virtue of any power by this constitution granted, or hereafter to be granted to him by the legislature, transport any of the in-

[1] Or governor and lieutenant governor.

[2] At the time, in the manner, and for the term, prescribed by each constitution.

[3] Universal.

habitants of this state, or oblige them to march out of the limits of the same, without their free and voluntary consent, or the consent of the legislature, nor grant commissions for exercising the law martial in any case without the advice and consent of the legislature.[1]

64. When the governor shall, with the consent of the legislature, be out of the state in time of war, at the head of a military force thereof, he shall continue commander-in-chief of all the military force of the state.[2] He shall also have power to conduct, either in person or in such other manner as shall be prescribed by law, all intercourse with other and foreign states.[3]

65. The governor shall have the power to grant reprieves, commutations and pardons, after conviction, for all offences except treason and cases of impeachment, upon such conditions, and with such restrictions and limitations, as he may think proper, subject to such regulations as may be provided by law relative to the manner of applying for pardons. Upon conviction for treason, he shall have power to suspend the execution of the sentence, until the case shall be reported to the legislature at its next session, when the legislature shall either pardon, or commute the sentence, direct the execution of the sentence, or grant a further reprieve. He shall annually communicate to the legislature each case of reprieve, commutation or pardon granted; stating the name of the convict, the crime of which he was convicted, the sentence and its date, and the date of the commutation, pardon or reprieve.[4]

66. The governor shall nominate, and by and with the advice and consent of the senate, appoint all civil and military officers of the state, whose appointment or election is not otherwise herein provided for, unless a different

[1] Const. Mass. Pt. II, Chapt. II, Sec. I, Art. 7; Const. New Hamp. tit. *Executive Power.*

[2] Const. N. Y. Art. IV, Sec. 6.

[3] Const. Va. Art. V, — 5.

[4] Const. N. Y. Art. IV, Sec. 5; Ill. IV, 8; Ind. V, 17; Ohio, III, 11. The exercise of the *pardoning power* is subjected to different regulations in some of the other states; sometimes it is reposed in the governor alone; sometimes in the governor and council.

mode of appointment be prescribed by the law creating the office.[1]

67. The governor shall have power to convene the legislature, whenever, in his opinion, public necessity requires it; and in case of disagreement between the two houses with respect to the time of adjournment, may adjourn them to such time as he shall think proper, not beyond the day of their next annual meeting. He shall communicate by message to the legislature, at every session, the condition of the state, and recommend such measures to them as he shall judge expedient. He shall transact all necessary business with the officers of government, civil and military; and may require information from any military officer, or any officer in the executive department, upon any subject relating to the duties of their respective offices. He shall, at stated times, receive for his services a compensation to be determined and established by law, which shall neither be increased nor diminished after his election and during his continuance in office.[2]

68. There shall be a seal of this state, which shall be kept by the governor, be used by him officially, and be called the Great Seal of the State of ———. All grants and commissions shall be in the name and by the authority of the State of ———, be sealed with the Great Seal, signed by the governor, and attested by the secretary of this state.

69. In case of the removal of the governor from office, or of his death, or resignation, the powers and duties of the office shall devolve on the speaker of the senate; and in case of the death, removal from office, or resignation of the speaker of the senate, the power and duties of the office shall devolve on the speaker of the house of representatives: provided that the speaker of the senate, or of the house of representatives, as the case may be, shall exercise the power and duties of said office only

[1] Const. Md. The constitutions widely differ in their dispositon of the power of appointment and of filling vacancies.

[2] Substantially common to all the constitutions.

until a governor shall be elected by the people and be duly qualified.[1]

OTHER STATE OFFICERS.

70. There shall be elected, by and from among the qualified electors of this state, a secretary of state, a state treasurer, an auditor-general, and an attorney-general, who shall severally hold their offices for the term of —— years, and perform such duties as may be prescribed by law.[2]

GENERAL PROVISIONS.

71. No member of congress, nor any person holding any office of profit or trust under the United States, or under any other state or foreign power, shall hold or exercise any office of trust or profit under this state.

72. Every person shall be disqualified from holding any office or place of honor or profit under the authority of this state who shall be convicted of having given or offered any bribe to procure his election or appointment.

73. All officers for a term of years shall hold their offices for the terms respectively specified, only on the condition that they so long behave themselves well; and shall be removed on conviction of misbehavior in office or of any infamous crime.

74. All writs shall be in the name of the state; and all indictments shall conclude in these words, viz.: *against the peace and dignity of the State of* ——.[3]

75. The following oath shall be taken and subscribed by every person elected or appointed to any office, civil or military, under this state, before he shall enter upon the duties of his office, to wit:—"I, A. B., do solemnly swear, that I will bear true faith and allegiance to the State of ——, and will support the Constitution thereof. So help

[1] Variously regulated.

[2] The provisions relating to state officers are various and cannot be reduced to any general form. Various provisions are also found relative to county officers.

[3] The foregoing, or similar general provisions, and a great variety of others, are found in each constitution.

me God."[1] And the members of the legislature, and all executive and judicial officers of this State, shall also take an oath to support the Constitution of the United States.

### MODE OF AMENDING THE CONSTITUTION.

76. Any specific amendment or amendments to the constitution, may be proposed in the senate or house of representatives, and if the same shall be agreed to by a majority of the members elected to each of the two houses, such proposed amendment or amendments shall be entered on their journals, with the yeas and nays taken thereon, and referred to the legislature then next to be chosen, and shall be published, for three months previous to making such choice, in at least one newspaper of each county, if any be published therein; and if in the legislature next chosen, as aforesaid, such proposed amendment or amendments, or any of them, shall be agreed to by a majority of all the members elected to each house, then it shall be the duty of the legislature to submit such proposed amendment or amendments, or such of them as may have been agreed to as aforesaid by the two legislatures, to the people, in such manner and at such time, at least four months after the adjournment of the legislature, as the legislature shall prescribe; and if the people at a special election to be held for that purpose only, shall approve and ratify such amendment or amendments, or any of them, by a majority of the electors qualified to vote for members of the legislature voting thereon, such amendment or amendments, so approved and ratified, shall become part of the constitution; *provided*, that if more than one amendment be submitted, they shall be submitted in such manner and form that the people may vote for or against each amendment separately and distinctly; but no

[1] Const. Mass. Amend. Art. 6; New Hamp. tit. *Oath and Subscriptions, etc.* In favor of persons conscientiously scrupulous of taking and subscribing an oath, it is provided that an affirmation 'under the pains and penalties of perjury,' may be substituted.

amendment or amendments shall be submitted to the people by the legislature oftener than once in five years.[1]

---

## (2 *g a*) OF THE FRAMING OF THE CONSTITUTION OF THE UNITED STATES; AND HEREIN, FIRST

### (1 *h*) OF THE GENERAL CONVENTION OF 1787.

§ 76. Action of congress.

On the 3rd of February, 1781, the delegates of the several states in congress assembled under the articles of confederation, passed a resolution recommending to the states that they vest a power in congress, to levy a duty of five per cent. *ad valorem*, upon certain articles named, to pay the debts of the United States.[2] The states, however, refused to acquiesce in this measure. Thence followed a series of resolutions in congress, pointing to the necessity of amending or revising the articles of union, and of granting to congress additional powers.[3] But these were also destined to fail of their object. It was considered that any proposition for perfecting those articles should originate in the state legislatures.[4]

§ 77. Annapolis convention.

In January, 1786, a resolution was passed by the legislature of Virginia to appoint commissioners, who, or any five of whom, were to meet such other commissioners as might be appointed by the other states, to take into consideration the trade of the United States, and to consider how far a uniform system in their commercial regulations might be necessary, etc.[5] In response to this movement of Virginia, New York, New Jersey, Pennsylvania, and Delaware, severally appointed their commissioners. These commissioners convened at Annapolis, Maryland, on the

[1] Const. N. J. Art. IX; N. Y. Art. XIII; Mass. Amend. Art. 9; Penna. Art. X; Tenn. Art. XI; Ohio, Art. XVI. The mode is generally much the same, but sometimes varied.

[2] See Elliot's Debates, Vol. I, p. 92.

[3] Id. p. 93. [4] Id. p. 111. [5] Id. p. 115.

11th of September, 1786. They did nothing of importance, however, but make a report to the state legislatures, recommending the calling of a general convention of all the states to meet at Philadelphia, on the second Monday of May, 1787, 'to take into consideration the situation of the United States; to devise such further provisions as shall appear to them necessary to render the Constitution of the Federal Government adequate to the exigencies of the Union; and to report such an act for that purpose, to the United States in Congress assembled, as when agreed to by them, and afterwards confirmed by the Legislature of every State, will effectually provide for the same.'[1] They say 'they are the more naturally led to this conclusion, as in the course of their reflections on the subject, they have been induced to think that the power of regulating trade is of such comprehensive extent, and will enter so far into the general system of the Federal Government, that, to give it efficacy, and to obviate questions and doubts concerning its precise nature and limits, may require a correspondent adjustment of other parts of the Federal System.'

§ 78. Further action of congress.

Upon considering the report of these commissioners, the then federal congress, on the 21st of February, 1787, resolved as follows: 'Whereas, there is provision in the Articles of Confederation and perpetual union, for making alterations therein, by the assent of a congress of the United States, and of the legislatures of the several States; and whereas experience hath evinced, that there are defects in the present confederation; as a mean to remedy which, several of the States, and particularly the State of New York, by express instructions to their delegates in congress, have suggested a convention for the purposes expressed in the following resolution; and such convention appearing to be the most probable mean of establishing in these States a firm national government: *Resolved*, That in the opinion of congress, it is expedient that, on the second Monday of May next, a Convention of Delegates,

[1] Elliot's Debates, Vol. I, p. 118.

who shall have been appointed by the several States, be held at Philadelphia, for the sole and express purpose of revising the Articles of Confederation, and reporting to Congress and the several Legislatures such alterations and provisions therein as shall, when agreed to in Congress and confirmed by the States, render the Federal Constitution adequate to the exigencies of Government and the preservation of the Union.'[1]

§ 79. Responses of the states.

From the several responses of the states,[2] it appears that each state, with the exception of Rhode Island, appointed and commissioned delegates to represent it in the proposed convention. The commissions of the delegates were similar to the following:

'By his Excellency, James Bowdoin, Esq., Governor of the Commonwealth of Massachusetts.

'To the Hon. Francis Dana, Elbridge Gerry, Nathaniel Gorham, Rufus King, and Caleb Strong, Esqrs., greeting:

'*Whereas*, Congress did, on the 21st day of February, A. D. 1787, Resolve, "That, in the opinion of Congress, it is expedient that, on the second Monday of May next, a Convention of Delegates, who shall have been appointed by the several States, be held at Philadelphia, for the sole and express purpose of revising the Articles of Confederation, and reporting to Congress and the several Legislatures, such alterations and provisions therein as shall, when agreed to in Congress, and confirmed by the States, render the Federal Constitution adequate to the exigencies of Government and the preservation of the Union:"

'*And whereas,* the General Court have constituted and appointed you their Delegates, to attend and represent this Commonwealth in the said proposed Convention, and have, by a resolution of theirs of the 10th of March last, requested me to commission you for that purpose:

'Now, therefore, know ye, that, in pursuance of the resolutions aforesaid, I do, by these presents, commission you, the said Francis Dana, Elbridge Gerry, Nathaniel

[1] Elliot's Debates, Vol. I, pp. 119, 120.
[2] Id. 126–128.

Gorham, Rufus King, and Caleb Strong, Esqrs., or any three of you, to meet such Delegates as may be appointed by the other, or any of the other States in the Union, to meet in Convention at Philadelphia, at the time and for the purposes aforesaid.

'In testimony whereof, I have caused the public Seal of the Commonwealth aforesaid to be hereunto affixed.

'Given at the Council Chamber, in Boston, the ninth day of April, A.D. 1787, and in the eleventh year of the Independence of the United States of America.'

§ 80. The parties in the convention.

From the reported proceedings of this general convention, it also appears, that the political parties of that day, the Nationals, and the Federals with whom were also the State-Rights men,[1] were there represented: the former favoring a consolidation of the powers of the governments of the states into one great national government; the latter, on the contrary, insisting upon a strict adherence to the fundamental principles of the original confederation. The two extreme parties, however, were induced to make mutual concessions: the more liberal of the State-Rights men conceding, that to remedy the principal defects of the articles of confederation, the federal government should act directly on the citizens of the states, individually, and be no longer compelled to resort to requisitions on the governments of the states, in order to execute its measures; and that, to remedy other imperfections, the people of the states should be represented in the federal legislature; the Nationals, in turn, abandoning their scheme of framing a government strictly national, for the people of the states as a single political body, and conceding that the states, as sovereign bodies, should be the foundation of the union, and be severally and equally represented in the government.

§ 81. The plan adopted.

The convention remained in session for many months, discussing the plan to be adopted, in framing the new constitution, and the nature, extent, and distribution of the

[1] See *post* § 151 *et seq.*

powers to be delegated to the general government; and finally, on the 17th day of September, 1787, agreed to submit, to be adopted or rejected by the people of each state, the following:

## CONSTITUTION OF THE UNITED STATES.

### PREAMBLE.

WE, the people of the United States, in order to form a more perfect union, establish justice, insure domestic tranquillity, provide for the common defence, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America.

### ARTICLE I.

*Of the Legislature.*

#### SECTION I.

1. All legislative powers herein granted, shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

#### SECTION II.

1. The House of Representatives shall be composed of members chosen every second year by the people of the several States; and the electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislature.

2. No person shall be a representative who shall not have attained to the age of twenty-five years, and been seven years a citizen of the United States, and who shall not, when elected, be an inhabitant of that State in which he shall be chosen.

3. Representatives and direct taxes shall be apportioned among the several States which may be included within this Union, according to their respective numbers, which shall be determined by adding to the whole number of free persons, including those bound to service for a term of years, and excluding Indians not taxed, three-fifths of

all other persons. The actual enumeration shall be made within three years after the first meeting of the Congress of the United States, and within every subsequent term of ten years, in such manner as they shall by law direct. The number of representatives shall not exceed one for every thirty thousand, but each State shall have at least one representative; and until such enumeration shall be made, the State of *New Hampshire* shall be entitled to choose three; *Massachusetts* eight; *Rhode Island* and *Providence Plantations* one; *Connecticut* five; *New York* six; *New Jersey* four; *Pennsylvania* eight; *Delaware* one; *Maryland* six; *Virginia* ten; *North Carolina* five; *South Carolina* five; and *Georgia* three.

4. When vacancies happen in the representation from any State, the executive authority thereof shall issue writs of election to fill up such vacancies.

5. The House of Representatives shall choose their speaker and other officers, and shall have the sole power of impeachment.

SECTION III.

1. The Senate of the United States shall be composed of two senators from each State, chosen by the legislature thereof, for six years, and each senator shall have one vote.

2. Immediately after they shall be assembled in consequence of the first election, they shall be divided, as equally as may be, into three classes. The seats of the senators of the first class shall be vacated at the expiration of the second year, of the second class at the expiration of the fourth, and of the third class at the expiration of the sixth year, so that one-third may be chosen every second year; and if vacancies happen, by resignation or otherwise, during the recess of the legislature of any State, the executive thereof may make temporary appointments until the next meeting of the legislature, which shall then fill such vacancies.

3. No person shall be a senator who shall not have attained to the age of thirty years, and been nine years a citizen of the United States, and who shall not, when

elected, be an inhabitant of that State for which he shall be chosen.

4. The Vice President of the United States shall be President of the Senate, but shall have no vote, unless they be equally divided.

5. The Senate shall choose their other officers, and also a president *pro tempore*, in the absence of the Vice President, or when he shall exercise the office of President of the United States.

6. The Senate shall have the sole power to try all impeachments. When sitting for that purpose, they shall be on oath or affirmation. When the President of the United States is tried, the chief justice shall preside; and no person shall be convicted without the concurrence of two-thirds of the members present.

7. Judgment in case of impeachment shall not extend further than to removal from office, and disqualification to hold and enjoy any office of honor, trust, or profit, under the United States; but the party convicted shall, nevertheless, be liable and subject to indictment, trial, judgment, and punishment according to law.

SECTION IV.

1. The times, places, and manner of holding elections for senators and representatives, shall be prescribed in each State by the legislature thereof; but the Congress may at any time, by law, make or alter such regulations, except as to the place of choosing senators.

2. The Congress shall assemble at least once in every year, and such meeting shall be on the first Monday in December, unless they shall by law appoint a different day.

SECTION V.

1. Each House shall be the judge of the elections, returns, and qualifications of its own members; and a majority of each shall constitute a quorum to do business; but a smaller number may adjourn from day to day, and may be authorized to compel the attendance of absent members, in such manner and under such penalties as each House may provide.

2. Each House may determine the rules of its proceedings, punish its members for disorderly behavior, and, with the concurrence of two-thirds, expel a member.

3. Each House shall keep a journal of its proceedings, and from time to time publish the same, excepting such parts as may in their judgment require secrecy; and the yeas and nays of the members of either House, on any question, shall, at the desire of one-fifth of those present, be entered on the journal.

4. Neither House during the session of Congress shall, without the consent of the other, adjourn for more than three days, nor to any other place than that in which the two Houses shall be sitting.

SECTION VI.

1. The senators and representatives shall receive a compensation for their services, to be ascertained by law, and paid out of the treasury of the United States. They shall in all cases, except treason, felony, and breach of the peace, be privileged from arrest during their attendance at the session of their respective Houses, and in going to or returning from the same; and for any speech or debate in either House, they shall not be questioned in any other place.

2. No senator or representative shall, during the time for which he was elected, be appointed to any civil office under the authority of the United States, which shall have been created, or the emoluments whereof shall have been increased, during such time; and no person holding any office under the United States shall be a member of either House during his continuance in office.

SECTION VII.

1. All bills for raising revenue shall originate in the House of Representatives; but the Senate may propose or concur with amendments, as on other bills.

2. Every bill which shall have passed the House of Representatives and the Senate shall, before it become a law, be presented to the President of the United States; if he approve, he shall sign it; but if not, he shall return it,

with his objections, to that House in which it shall have originated, who shall enter the objections at large on their journal, and proceed to reconsider it. If, after such reconsideration, two-thirds of that House shall agree to pass the bill, it shall be sent, together with the objections, to the other House, by which it shall likewise be reconsidered, and if approved by two-thirds of that House, it shall become a law. But in all such cases the votes of both Houses shall be determined by yeas and nays, and the names of the persons voting for and against the bill shall be entered on the journal of each House respectively. If any bill shall not be returned by the President within ten days (Sundays excepted) after it shall have been presented to him, the same shall be a law in like manner as if he had signed it, unless the Congress by their adjournment prevent its return, in which case it shall not be a law.

3. Every order, resolution, or vote to which the concurrence of the Senate and House of Representatives may be necessary, (except a question of adjournment,) shall be presented to the President of the United States; and before the same shall take effect, shall be approved by him, or being disapproved by him, shall be re-passed by two-thirds of the Senate and House of Representatives, according to the rules and limitations prescribed in the case of a bill.

SECTION VIII.

The Congress shall have power—

1. To lay and collect taxes, duties, imposts, and excises, to pay the debts and provide for the common defence and general welfare of the United States; but all duties, imposts, and excises shall be uniform throughout the United States:

2. To borrow money on the credit of the United States:

3. To regulate commerce with foreign nations, and among the several States, and with the Indian tribes:

4. To establish a uniform rule of naturalization, and uniform laws on the subject of bankruptcies, throughout the United States:

5. To coin money, regulate the value thereof, and of

foreign coin, and fix the standard of weights and measures:

6. To provide for the punishment of counterfeiting the securities and current coin of the United States:

7. To establish post offices and post roads:

8. To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries:

9. To constitute tribunals inferior to the Supreme Court:

10. To define and punish piracies and felonies committed on the high seas, and offences against the law of nations:

11. To declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water:

12. To raise and support armies; but no appropriation of money to that use shall be for a longer term than two years:

13. To provide and maintain a navy:

14. To make rules for the government and regulation of the land and naval forces:

15. To provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions:

16. To provide for organizing, arming, and disciplining the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the States respectively the appointment of the officers and the authority of training the militia according to the discipline prescribed by Congress:

17. To exercise exclusive legislation, in all cases whatsoever, over such district (not exceeding ten miles square,) as may, by cession of particular States and the acceptance of Congress, become the seat of government of the United States, and to exercise like authority over all places purchased, by the consent of the legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dock-yards, and other needful buildings: and,

18. To make all laws which shall be necessary and

proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or any department or officer thereof.

SECTION IX.

1. The migration or importation of such persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the year one thousand eight hundred and eight, but a tax or duty may be imposed on such importation, not exceeding ten dollars for each person.

2. The privilege of the writ of *habeas corpus* shall not be suspended unless when, in case of rebellion or invasion, the public safety may require it.

3. No bill of attainder, or *ex post facto* law, shall be passed.

4. No capitation or other direct tax shall be laid, unless in proportion to the census or enumeration hereinbefore directed to be taken.

5. No tax or duty shall be laid on articles exported from any State. No preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another; nor shall vessels bound to or from one State be obliged to enter, clear, or pay duties in another.

6. No money shall be drawn from the treasury but in consequence of appropriations made by law: and a regular statement and account of the receipts and expenditures of all public money shall be published from time to time.

7. No title of nobility shall be granted by the United States, and no person holding any office of profit or trust under them shall, without the consent of Congress, accept of any present, emolument, office, or title of any kind whatever, from any king, prince, or foreign state.

SECTION X.

1. No State shall enter into any treaty, alliance, or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make anything but gold and silver coin a tender in payment of debts; pass any bill of

attainder, *ex post facto* law, or law impairing the obligation of contracts; or grant any title of nobility.

2. No State shall, without the consent of Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws; and the net produce of all duties and imposts laid by any State on imports or exports shall be for the use of the treasury of the United States, and all such laws shall be subject to the revision and control of Congress. No State shall, without the consent of Congress, lay any duty on tonnage, keep troops or ships of war in time of peace, enter into any agreement or compact with another State, or with a foreign power, or engage in war, unless actually invaded, or in such imminent danger as will not admit of delay.

## ARTICLE II.

### *Of the Executive.*

#### SECTION I.

1. The executive power shall be vested in a President of the United States of America. He shall hold his office during the term of four years, and, together with the Vice President, chosen for the same term, be elected as follows:

2. Each State shall appoint, in such manner as the legislature thereof may direct, a number of electors, equal to the whole number of senators and representatives to which the State may be entitled in Congress; but no senator or representative, or person holding any office of trust or profit under the United States, shall be appointed an elector.

3. The electors shall meet in their respective States, and vote by ballot for two persons, of whom one at least shall not be an inhabitant of the same State with themselves. And they shall make a list of all the persons voted for, and of the number of votes for each; which list they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the President of the Senate. The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates, and the votes shall then be

counted. The person having the greatest number of votes shall be the President, if such number be a majority of the whole number of electors appointed; and if there be more than one who have such a majority, and have an equal number of votes, then the House of Representatives shall immediately choose by ballot one of them for President; and if no person have a majority, then, from the five highest on the list, the said House shall in like manner choose the President. But in choosing the President, the votes shall be taken by States; the representation from each State having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the States, and a majority of all the States shall be necessary to a choice. In every case, after the choice of the President, the person having the greatest number of votes of the electors shall be Vice President. But if there should remain two or more who have equal votes, the Senate shall choose from them by ballot the Vice President.[1]

4. The Congress may determine the time of choosing the electors and the day on which they shall give their votes, which day shall be the same throughout the United States.

5. No person except a natural born citizen, or a citizen of the United States at the time of the adoption of this Constitution, shall be eligible to the office of President; neither shall any person be eligible to that office who shall not have attained to the age of thirty-five years, and been fourteen years a resident within the United States.

6. In case of the removal of the President from office, or of his death, resignation, or inability to discharge the powers and duties of the said office, the same shall devolve on the Vice President; and the Congress may by law provide for the case of removal, death, resignation, or inability, both of the President and Vice President, declaring what officer shall then act as President; and such

[1] This third section is supplied by the XIIth Amendment. See *post*, AMENDMENTS.

officer shall act accordingly, until the disability be removed or a President shall be elected.

7. The President shall, at stated times, receive for his services a compensation, which shall neither be increased nor diminished during the period for which he shall have been elected, and he shall not receive within that period any other emolument from the United States, or any of them.

8. Before he enter on the execution of his office, he shall take the following oath or affirmation:

'I do solemnly swear (or affirm) that I will faithfully execute the office of President of the United States, and will, to the best of my ability, preserve, protect, and defend the Constitution of the United States.'

SECTION II.

1. The President shall be commander-in-chief of the army and navy of the United States and of the militia of the several States, when called into the actual service of the United States; he may require the opinion in writing of the principal officer in each of the executive departments, upon any subject relating to the duties of their respective offices; and he shall have power to grant reprieves and pardons for offences against the United States, except in cases of impeachment.

2. He shall have power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the senators present concur: and he shall nominate, and by and with the advice and consent of the Senate, shall appoint ambassadors, other public ministers and consuls, judges of the Supreme Court, and all other officers of the United States whose appointments are not herein otherwise provided for, and which shall be established by law. But the Congress may by law vest the appointment of such inferior officers as they think proper in the President alone, in the courts of law, or in the heads of departments.

3. The President shall have power to fill up all vacancies that may happen during the recess of the Senate, by

granting commissions, which shall expire at the end of their next session.

SECTION III.

1. He shall, from time to time, give to Congress information of the state of the Union, and recommend to their consideration such measures as he shall judge necessary and expedient; he may, on extraordinary occasions, convene both Houses, or either of them; and in case of disagreement between them, with respect to the time of adjournment, he may adjourn them to such time as he shall think proper; he shall receive ambassadors and other public ministers; he shall take care that the laws be faithfully executed; and shall commission all the officers of the United States.

SECTION IV.

1. The President, Vice President, and all civil officers of the United States, shall be removed from office on impeachment for and conviction of treason, bribery, or other high crimes and misdemeanors.

## ARTICLE III.

### *Of the Judiciary.*

SECTION I.

1. The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as Congress may, from time to time, order and establish. The judges, both of the Supreme and inferior courts, shall hold their offices during good behaviour; and shall, at stated times, receive for their services a compensation, which shall not be diminished during their continuance in office.

SECTION II.

1. The judicial power shall extend to all cases in law and equity arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between

two or more States; between a State and citizens of another State; between citizens of different States; between citizens of the same State claiming lands under grants of different States; and between a State, or the citizens thereof, and foreign states, citizens or subjects.

2. In all cases affecting ambassadors, other public ministers, and consuls, and those in which a State shall be a party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations as Congress shall make.

3. The trial of all crimes, except in cases of impeachment, shall be by jury, and such trial shall be held in the State where the said crimes shall have been committed; but when not committed within any State, the trial shall be at such place or places as Congress may by law have directed.

SECTION III.

1. Treason against the United States shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort. No person shall be convicted of treason, unless on the testimony of two witnesses to the same overt act, or confession in open court.

2. Congress shall have power to declare the punishment of treason; but no attainder of treason shall work corruption of blood, or forfeiture, except during the life of the person attainted.

ARTICLE IV.

*Miscellaneous.*

SECTION I.

1. Full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State. And Congress may, by general laws, prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof.

SECTION II.

1. The citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States.

2. A person charged in any State with treason, felony, or other crime, who shall flee from justice and be found in another State, shall, on demand of the executive authority of the State from which he fled, be delivered up, to be removed to the State having jurisdiction of the crime.

3. No person held to service or labor in one State, under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labor; but shall be delivered up on claim of the party to whom such service or labor may be due.

SECTION III.

1. New States may be admitted by Congress into this Union; but no new State shall be formed or erected within the jurisdiction of any other State, nor any State be formed by the junction of two or more States, or parts of States, without the consent of the legislatures of the States concerned, as well as of Congress.

2. Congress shall have power to dispose of, and make all needful rules and regulations respecting the territory, or other property belonging to the United States; and nothing in this Constitution shall be so construed as to prejudice any claims of the United States or of any particular State.

SECTION IV.

1. The United States shall guarantee to every State in this Union a republican form of government, and shall protect each of them against invasion; and, on application of the legislature, or of the executive (when the legislature cannot be convened), against domestic violence.

ARTICLE V.

*Of Amendments.*

1. Congress, whenever two-thirds of both Houses shall deem it necessary, shall propose amendments to this Constitution; or, on the application of the legislatures of two-thirds of the several States, shall call a convention for proposing amendments, which, in either case, shall be valid to all intents and purposes, as part of this Constitution, when ratified by the legislatures of three-fourths of the several

LIBRARY OF THE
LELAND STANFORD JR. UNIVERSITY
LAW DEPARTMENT



States, or by conventions in three-fourths thereof, as the one or the other mode of ratification may be proposed by Congress; provided, that no amendment which may be made prior to the year one thousand eight hundred and eight, shall in any manner affect the first and fourth clauses in the ninth section of the first article; and that no State, without its consent, shall be deprived of its equal suffrage in the Senate.

ARTICLE VI.

*Miscellaneous.*

1. All debts contracted and engagements entered into, before the adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation.

2. This Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the constitution or laws of any State to the contrary notwithstanding.

3. The senators and representatives before mentioned, and the members of the several State legislatures, and all executive and judicial officers, both of the United States and of the several States, shall be bound by oath or affirmation to support this Constitution; but no religious test shall ever be required as a qualification to any office, or public trust, under the United States.

ARTICLE VII.

*Of the Ratification.*

1. The ratification of the conventions of nine States shall be sufficient for the establishment of this Constitution between the States so ratifying the same.

Done in Convention, by the unanimous consent of the States present, the seventeenth day of September, in the year of our Lord one thousand seven hundred and eighty-seven, and of the Independence of the United

States of America the twelfth. In witness whereof, we have hereunto subscribed our names.

GEORGE WASHINGTON,
*President, and Deputy from Virginia.*

NEW HAMPSHIRE.
JOHN LANGDON,
NICHOLAS GILMAN.

MASSACHUSETTS.
NATHANIEL GORMAN,
RUFUS KING.

CONNECTICUT.
WILLIAM SAMUEL JOHNSON,
ROGER SHERMAN.

NEW YORK.
ALEXANDER HAMILTON.

NEW JERSEY.
WILLIAM LIVINGSTON,
DAVID BREARLY,
WILLIAM PATTERSON,
JONATHAN DAYTON.

PENNSYLVANIA.
BENJAMIN FRANKLIN,
THOMAS MIFFLIN,
ROBERT MORRIS,
GEORGE CLYMER,
THOMAS FITZSIMONS,
JARED INGERSOLL,
JAMES WILSON,
GOUVERNEUR MORRIS.

DELAWARE.
GEORGE READ,
GUNNING BEDFORD, JUN.,
JOHN DICKINSON,
RICHARD BASSETT,
JACOB BROOM.

MARYLAND.
JAMES MCHENRY,
DANIEL OF ST. THO. JENIFER,
DANIEL CARROLL.

VIRGINIA.
JOHN BLAIR,
JAMES MADISON, JR.

NORTH CAROLINA.
WILLIAM BLOUNT,
RICHARD DOBBS SPAIGHT,
HUGH WILLIAMSON.

SOUTH CAROLINA.
JOHN RUTLEDGE,
CHAS. COTESWORTH PINCKNEY,
CHARLES PINCKNEY,
PIERCE BUTLER.

GEORGIA.
WILLIAM FEW,
ABRAHAM BALDWIN.

*Attest,* WILLIAM JACKSON, *Secretary.*

---

§ 82. The plan recommended, not imposed.

Such was the federal constitution as originally framed and submitted by the GENERAL CONVENTION OF THE STATES. 'This Convention, composed of men who possessed the confidence of the people, and many of whom had been highly distinguished by their patriotism, virtue, and wisdom, in times which tried the souls of men, undertook the arduous task. In the mild season of peace, with minds unoccupied with other subjects, they passed many months in cool, uninterrupted, and daily consultations; and finally, without having been awed by power, or influenced by any passion, except love for their country, they presented and

recommended to the people the plan produced by their joint and very unanimous councils.'[1]

It is to be recollected, 'that the powers of the convention were merely advisory and recommendatory; that they were so meant by the states, and so understood by the convention; and that the latter accordingly planned and proposed a constitution, which was to be of no more consequence than the paper on which it was written, unless it should be stamped with the approbation of those to whom it was addressed.'[2]

§ 88. How submitted by the convention.

Concluding its labors, the convention submitted the instrument, by a resolution, and a letter accompanying the same to the president of congress;[3] which resolution and letter I here subjoin.

'IN CONVENTION.

'MONDAY, SEPTEMBER 17, 1787.

'PRESENT

'*The States of New Hampshire; Massachusetts; Connecticut; Mr. Hamilton, from New York; New Jersey; Pennsylvania; Delaware; Maryland; Virginia; North Carolina; South Carolina; and Georgia.*[4]

'*Resolved*, That the preceding Constitution be laid before the United States in Congress assembled; and that it is the opinion of this Convention, that it should afterwards be submitted to a Convention of Delegates, chosen in each State by the People thereof, under the recommendation of its Legislature, for their assent and ratification; and that each Convention assenting to, and ratifying the same, should give notice thereof to the United States in Congress assembled.

'*Resolved*, That it is the opinion of this Convention, that

[1] The Federalist Letter No. 2.

[2] The Federalist, No. 40, p. 188.

[3] See Elliot's Debates, Vol. I, p. 16.

[4] Rhode Island was opposed to increasing the power of the federal government, and took no part in the formation of the constitution.

as soon as the Conventions of nine States shall have ratified this Constitution, the United States in Congress assembled should fix a day on which electors should be appointed by the States which shall have ratified the same, and a day on which the electors should assemble to vote for the President, and the time and place for commencing proceedings under this Constitution; that after such publication, the electors should be appointed, and the senators and representatives elected; that the electors should meet on the day fixed for the election of the President, and should transmit their votes, certified, signed, sealed, and directed, as the Constitution requires, to the Secretary of the United States in Congress assembled; that the senators and representatives should convene at the time and place assigned; that the senators should appoint a president of the senate, for the sole purpose of receiving, opening, and counting the votes for President; and that after he shall be chosen, the Congress, together with the President, should, without delay, proceed to execute this Constitution.

'*By the unanimous order of the Convention.*

'GEORGE WASHINGTON, *President.*

'WILLIAM JACKSON, *Secretary.*'

§ 88. *a.* Letter of the convention to the president of congress.

'IN CONVENTION.

'SEPTEMBER 17, 1787.

'SIR,

'We have now the honor to submit to the consideration of the United States in Congress assembled that Constitution which has appeared to us the most advisable.

'The friends of our country have long seen and desired, that the power of making war, peace and treaties; that of levying money and regulating commerce, and the correspondent executive and judicial authorities, should be fully and effectually vested in the general government of the union: but the impropriety of delegating such extensive trusts to one body of men is evident. Hence results the necessity of a different organization.

'It is obviously impracticable in the Federal Govern-

ment of these States, to secure all rights of independent sovereignty to each, and yet provide for the interest and safety of all. Individuals entering into society must give up a share of liberty to preserve the rest. The magnitude of the sacrifice must depend as well on situation and circumstance, as on the object to be obtained. It is at all times difficult to draw with precision the line between those rights which must be surrendered, and those which may be reserved; and on the present occasion this difficulty was increased by a difference among the several States as to their situation, extent, habits, and particular interests.[1]

'In all our deliberations on this subject, we kept steadily in our view that which appears to us the greatest interest of every true American, the consolidation of our union, in which is involved our prosperity, felicity, safety, perhaps our national existence. This important consideration, seriously and deeply impressed on our minds, led each State in the Convention to be less rigid on points of inferior magnitude than might have been otherwise expected; and thus the Constitution, which now we present, is the result of a spirit of amity, and of that mutual deference and concession which the peculiarity of our political situation rendered indispensable.

'That it will meet the full and entire approbation of every State, is not perhaps to be expected; but each will doubtless consider, that had her interests been alone consulted, the consequences might have been particularly disagreeable or injurious to others: that it is liable to as few exceptions as could reasonably have been expected, we hope and believe: that it may promote the lasting welfare of that country so dear to us all, and secure her freedom and happiness, is our most ardent wish.

[1] It will be observed, that the above paragraph very clearly points to the boundary line between the internal sovereignty or right of self-government, and the external sovereignty or right of control of external affairs. The latter was to be delegated to the common government.

'With great respect, we have the honor to be, sir, your excellency's most obedient and humble servants.

'GEORGE WASHINGTON, *President.*

'*By unanimous order of the Convention.*

'His excellency, the PRESIDENT OF CONGRESS.'

§ 84. Action of congress.

The foregoing constitution, resolutions and letter, being reported by the general convention of the states to the then federal congress, that body, on the 28th of September, 1787, unanimously *resolved*:—'That the said report, with the resolutions and letter accompanying the same, be transmitted to the several Legislatures, in order to be submitted to a Convention of Delegates chosen in each State by the people thereof, in conformity to the resolves of the Convention, made and provided in that case.'

Thus the new constitution was submitted to the *people*, for *their* ratification or rejection. But to the people of—what? In this connection the words of the preamble, 'We, the people *of the United States*, . . . . . *do ordain*,' etc., should be considered. Some have argued from this, that the constitution of the United States was 'ordained and established,' not by the 'people' of each state, but by 'the nation;' meaning by 'the nation,' the American people at large as composing A SINGLE POLITICAL COMMUNITY. By the resolutions and letter of the general convention that framed it, seconded by the resolution of congress, the instrument was referred to the several legislatures of the states; a copy of the original was transmitted to each, with the recommendation that it 'be submitted to *a Convention of Delegates chosen in each State by the people thereof.*' By the separate and independent action of each state legislature, it was so submitted; and by the separate and independent action of each state convention, as we shall see, it was finally adopted, assented to and ratified. The plan of ratification was prescribed by the very last article of the instrument itself; which, as we have seen, provided that 'the ratification of the *conventions* of *nine states* shall be sufficient for the establishment of this constitution *between the*

*States* so ratifying the same.' We must therefore understand, that the words of the preamble, 'We, the people of the United States,' were employed in the sense of 'We, *the people of' each* 'of the United States;' and meant, We, *the body of electors of each* of the United States: these *electors* being the 'people' always intended, and the only people ever known in the history of our sovereign legislation.[1]

## (2 A) OF THE RATIFYING CONVENTIONS OF THE STATES AND THE ORDINANCES OF RATIFICATION.

§ 85. Action of the states.

THE original articles of confederation had only been sanctioned by authority of the *state legislatures:* and as these legislatures were merely the agents of the people, the ministers of the original thirteen sovereigns, having no proper authority to delegate their powers; and as, for that reason, the validity of the articles of confederation had often been questioned; it was from the first proposed that the new constitution should be established by the paramount authority of the PEOPLE (or body of electors) composing each state; so that it should rest upon the same foundation with that of the constitution of each state.

In order to show by the highest authority, namely, the *records,* in what manner the work was completed, I shall introduce these sovereigns to speak for themselves by their several ordinances of ratification, and in the order in which they originally spoke.[2]

§ 85. *a.*

DELAWARE.—'We, the Deputies of the people of the Delaware State, in Convention met, having taken into serious consideration the Federal Constitution, proposed and

[1] See the *original form* of the preamble, § 109, *post;* who *'the people'* are, § 90 *et seq.*, and as to *citizens,* of the states and the United States, § 155.

[2] The ordinances passed by the several conventions of the states, are collected together in Elliot's Debates, Vol. I, pp. 319 to 335.

agreed upon by the Deputies of the United States, in a General Convention, held at the City of Philadelphia, on the seventeenth day of September, in the year of our Lord one thousand seven hundred and eighty-seven, have approved, assented to, ratified, and confirmed, and by these presents do, in virtue of the power and authority to us given, for and in behalf of ourselves and our constituents, fully, freely, and entirely approve of, assent to, ratify, and confirm, the said Constitution.

'Done in Convention, at Dover, this seventh day of December, in the year aforesaid, and in the year of the Independence of the United States of America, the twelfth.'[1]

§ 85. *b.* PENNSYLVANIA.—'In the name of the People of Pennsylvania.

'Be it known unto all men, that we, the Delegates of the People of the Commonwealth of Pennsylvania, in General Convention assembled, have assented to and ratified, and by these presents do, in the name and by the authority of the same People, and for ourselves, assent to and ratify the foregoing the Constitution for the United States of America. Done in Convention at Philadelphia, the twelfth day of December, in the year of our Lord one thousand seven hundred and eighty-seven, and of the Independence of the United States of America the twelfth. In witness whereof, we have hereunto subscribed our names.'[2]

§ 85. *c.* NEW JERSEY.—(After reciting the previous proceedings, of the convention of the states, of congress, and of the state legislature, the ratifying convention of this state says:)

'Now be it known, That we, the Delegates of the State of New Jersey, chosen by the people thereof, for the purposes aforesaid, having maturely deliberated on and considered the aforesaid proposed Constitution, do hereby, for and on the behalf of the people of the said State of New

[1] Elliot's Debates, Vol. I, p. 319.
[2] Elliot's Debates, Vol. I, p. 319.

Jersey, agree to, ratify, and confirm, the same and every part thereof.

'Done in Convention, by the unanimous consent of the members present, this 18th day of December, in the year of our Lord 1787, and of the Independence of the United States of America, the twelfth.'[1]

GEORGIA.—'In Convention, Wednesday, January 2nd, 1788. § 85. *d.*

'To all to whom these presents shall come, greeting:

'*Whereas*, The form of a Constitution for the Government of the United States of America, was, on the 17th day of September, 1787, agreed upon and reported to Congress, by the Deputies of the said United States, convened in Philadelphia, which said Constitution is written in the words following, to wit:[2]

'*And Whereas*, The United States in Congress assembled did, on the 28th day of September, 1787, *Resolve*, unanimously, "That the said report, with the resolutions and letter accompanying the same, be transmitted to the several Legislatures, in order to be submitted to a Convention of Delegates chosen in each State by the people thereof, in conformity to the resolves of the Convention made and provided in that case:"—

'*And Whereas*, The Legislature of the State of Georgia did, on the 26th day of October, 1787, in pursuance of the above recited resolution of Congress, *Resolve*, That a Convention be elected on the day of the next general election, and in the same manner that representatives are elected; and that the said Convention consist of not more than three members from each county; and that the said Convention should meet at Augusta, on the fourth Tuesday in December then next, and as soon thereafter as convenient, proceed to consider the said report and resolutions, and to adopt or reject any part or the whole thereof:

'Now know ye, that we, the Delegates of the people of the State of Georgia, in Convention met, pursuant to the resolu-

[1] Elliot's Debates, Vol. I, p. 320-2.

[2] Here follows a copy of the constitution.

tions of the Legislature aforesaid, having taken into our serious consideration the said Constitution, have assented to, ratified, and adopted, and by these presents do, in virtue of the powers and authority to us given by the people of the said State for that purpose, for and in behalf of ourselves and our constituents, fully and entirely assent to, ratify, and adopt the said Constitution.

'Done in Convention, at Augusta, in the said State, on the 2nd day of January, in the year of our Lord, 1788, and of the Independence of the United States, the twelfth.'[1]

§ 85. *e.* CONNECTICUT.—'In the name of the People of the State of Connecticut.

'We, the Delegates of the People of said State, in General Convention assembled, pursuant to an Act of the Legislature in October last, have assented to, and ratified, and by these presents do assent to, ratify, and adopt the Constitution reported by the Convention of Delegates, in Philadelphia, on the 17th day of September, A. D., 1787, for the United States of America.

'Done in Convention, at Hartford, this 9th day of January, A. D., 1788. In witness whereof, we have hereunto set our hands.'[2]

§ 85. *f.* MASSACHUSETTS.—'Commonwealth of Massachusetts.

'The Convention having impartially discussed, and fully considered, the Constitution for the United States of America, reported to Congress by the Convention of Delegates from the United States of America, and submitted to us by a resolution of the General Court of the said Commonwealth, passed the 25th day of October, last past,—and acknowledging, with grateful hearts, the goodness of the Supreme Ruler of the Universe in affording the people of the United States, in the course of his providence, an opportunity, deliberately and peaceably, without fraud or surprise, of entering into

[1] Elliot's Debates, Vol. I, p. 323.
[2] Elliot's Debates, Vol. I, p. 321.

an explicit and solemn compact with each other, by assenting to and ratifying a new Constitution, in order to form a more perfect Union, establish justice, insure domestic tranquillity, provide for the common defence, promote the general welfare, and secure the blessings of liberty to themselves and their posterity,—do, in the name and in behalf of the people of the Commonwealth of Massachusetts, assent to and ratify the said Constitution for the United States of America.

'And as it is the opinion of this Convention, that certain amendments and alterations in the said Constitution would remove the fears, and quiet the apprehensions, of many of the good people of this Commonwealth, and more effectually guard against an undue administration of the Federal Government,—the Convention do therefore recommend that the following alterations and provisions be introduced into the said Constitution:—

'I. That it explicitly declare that all powers not expressly delegated by the aforesaid Constitution are reserved to the several States, to be by them exercised.

'II. That there shall be one representative to every thirty thousand persons, according to the census mentioned in the Constitution, until the whole number of the representatives amounts to two hundred.

'III. That Congress do not exercise the powers vested in them by the 4th section of the 1st Article, but in cases where a State shall neglect or refuse to make the regulations therein mentioned, or shall make regulations subversive of the right of the people to a free and equal representation in Congress, agreeably to the Constitution.

'IV. That Congress do not lay direct taxes but when the moneys arising from the impost and excise are insufficient for the public exigencies, nor then, until Congress shall have first made a requisition upon the States to assess, levy, and pay, their respective proportions of such requisition; agreeably to the census fixed in the said Constitution, in such way and manner as the Legislatures of the States shall think best; and in such case, if any State shall neglect or refuse to pay its proportion, pursuant to such

requisition, then Congress may assess and levy such State's proportion, together with interest thereon at the rate of six per cent. per annum, from the time of payment prescribed in such requisition.

'V. That Congress erect no company of merchants with exclusive advantages of commerce.

'VI. That no person shall be tried for any crime by which he may incur an infamous punishment, or loss of life, until he be first indicted by a grand jury, except in such cases as may arise in the government and regulation of the land and naval forces.

'VII. The Supreme Judicial Federal Court shall have no jurisdiction of causes between citizens of different States, unless the matter in dispute, whether it concerns the realty or personalty, be of the value of three thousand dollars at the least; nor shall the Federal Judicial powers extend to any actions between citizens of different States, where the matter in dispute, whether it concerns the realty or personalty, is not of the value of fifteen hundred dollars at least.

'VIII. In civil actions between citizens of different States, every issue of fact, arising in actions at common law, shall be tried by a jury, if the parties, or either of them, request it.

'IX. Congress shall at no time consent that any person, holding an office of trust or profit under the United States, shall accept of a title of nobility, or any other title or office, from any king, prince, or foreign state.

'And the Convention do, in the name and in behalf of the people of this Commonwealth, enjoin it upon their representatives in Congress, at all times, until the alterations and provisions aforesaid have been considered, agreeably to the fifth article of the said Constitution, to exert all their influence, and use all reasonable and legal methods, to obtain a ratification of the said alterations and provisions, in such manner as is provided in the said article.

'And that the United States, in Congress assembled, may have due notice of the assent and ratification of the said Constitution by this Convention, it is *Resolved*, That

the assent and ratification aforesaid be engrossed on parchment, together with the recommendation and injunction aforesaid, and with this resolution: and that his Excellency, John Hancock, Esq., President, and the Hon. William Cushing, Esq., Vice President of the Convention, transmit the same, countersigned by the Secretary of the Convention, under their hands and seals, to the United States in Congress assembled.'[1]

§ 85. *g*. MARYLAND.—'In Convention of the Delegates of the people of the State of Maryland, April 28, 1788.

'We, the Delegates of the people of the State of Maryland, having fully considered the Constitution of the United States of America, reported to Congress, by the Convention of Deputies, from the United States of America, held in Philadelphia, on the 17th day of September, in the year 1787, of which the annexed is a copy, and submitted to us by a resolution of the General Assembly of Maryland, in November Session, 1787, do, for ourselves, and in the name, and on behalf of the people of this State, assent to, and ratify the said Constitution.

'In witness whereof, we have hereunto subscribed our names.'[2]

§ 85. *h*. SOUTH CAROLINA.—'In Convention of the people of the State of South Carolina, by their representatives, held in the City of Charleston, on Monday the 12th day of May, and continued by divers adjournments to Friday the 23d day of May, Anno Domini, 1788, and in the twelfth year of the Independence of the United States of America.

'The Convention, having maturely considered the Constitution, or form of Government, reported to Congress by the Convention of Delegates from the United States of America, and submitted to them by a resolution of the Legislature of this State, passed the 17th and 18th days of February last, in order to form a more perfect Union, establish justice, insure domestic tranquillity, provide for

[1] Elliot's Debates, Vol. I, pp. 322–3.
[2] Elliot's Debates, Vol. I, p. 324.

the common defence, promote the general welfare, and secure the blessings of liberty to the people of the said United States, and their posterity,—Do, in the name and behalf of the people of this State, hereby assent to and ratify the said Constitution.

'Done in Convention, the 23d day of May, in the year of our Lord, 1788, and of the Independence of the United States of America, the twelfth.

'*And Whereas,* It is essential to the preservation of the rights reserved to the several States, and the freedom of the people, under the operations of a General Government, that the right of prescribing the manner, time, and places of holding the elections to the Federal Legislature, should be forever inseparably annexed to the sovereignty of the several States,—This Convention doth declare, that the same ought to remain, to all posterity, a perpetual and fundamental right in the local, exclusive of the interference of the General, Government, except in cases where the Legislatures of the States shall refuse or neglect to perform and fulfil the same, according to the tenor of the said Constitution. This Convention doth also declare, that no section or paragraph of the said Constitution warrants a construction, that the States do not retain every power not expressly relinquished by them, and vested in the General Government of the Union.

'*Resolved,* That the General Government of the United States ought never to impose direct taxes, *but* where the moneys arising from the duties, imposts, and excise, are insufficient for the public exigencies, *nor then until* Congress shall have made a requisition upon the States to assess, levy and pay, their respective proportions of such requisitions; and in case any State shall neglect or refuse to pay its proportion, pursuant to such requisition, then Congress may assess and levy such State's proportion, together with interest thereon, at the rate of six per centum per annum, from the time of payment prescribed by such requisition.

'*Resolved,* That the third section of the sixth article ought to be amended by inserting the word "other" between the words "no" and "religious."

'*Resolved*, That it be a standing instruction to all such Delegates as may hereafter be elected to represent this State in the General Government, to exert their utmost abilities and influence to effect an alteration of the Constitution, conformably to the foregoing resolutions.

'Done in Convention, the 23d day of May, in the year of our Lord, 1788, and of the Independence of the United States of America, the twelfth.'[1]

NEW HAMPSHIRE.—'In Convention of the Delegates of the People of the State of New Hampshire, June the 21st, 1788.' § 85. i.

'The Convention, having impartially discussed and fully considered the Constitution for the United States of America, reported to Congress by the Convention of Delegates from the United States of America, and submitted to us by a resolution of the General Court of said State, passed the 14th day of December last past, and acknowledging, with grateful hearts, the goodness of the Supreme Ruler of the Universe in affording the people of the United States, in the course of His providence, an opportunity, deliberately and peaceably, without fraud or surprise, of entering into an explicit and solemn Compact with each other, by assenting to and ratifying a new Constitution, in order to form a more perfect union, establish justice, insure domestic tranquillity, provide for the common defence, promote the general welfare, and secure the blessings of liberty to themselves and their posterity,—Do, in the name and behalf of the people of the State of New Hampshire, assent to and ratify the said Constitution for the United States of America. And as it is the opinion of this Convention, that certain amendments and alterations in the said Constitution would remove the fears and quiet the apprehensions of many of the good people of this State, and more effectually guard against an undue administration of the Federal Government,—the Convention do, therefore, recommend that the following amend-

[1] Elliot's Debates, Vol. I, p. 325.

ments and provisions be introduced in the said Constitution:—

'I. That it be explicitly declared that all powers not expressly and particularly delegated by the aforesaid Constitution, are reserved to the several States, to be by them exercised.

'II. That there shall be one representative to every thirty thousand persons, according to the census mentioned in the Constitution, until the whole number of representatives amounts to two hundred.

'III. That Congress do not exercise the power vested in them by the fourth section of the first article, but in case when a State shall neglect or refuse to make the regulations therein mentioned, or shall make regulations subversive of the right of the people to a free and equal representation in Congress; nor shall Congress in any case make regulations contrary to a free and equal representation.

'IV. That Congress do not lay direct taxes, but when the moneys arising from impost, excise, and their other resources, are insufficient for the public exigencies; nor then, until Congress shall have first made a requisition upon the States to assess, levy, and pay, their respective proportions of such requisition, agreeably to the census fixed in the said Constitution, in such way and manner as the Legislature of the State shall think best; and in such case, if any State shall neglect, then Congress may assess and levy such State's proportion, together with the interest thereon, at the rate of six per cent. per annum, from the time of payment prescribed in such requisition.

'V. That Congress shall erect no company of merchants with exclusive advantages of commerce.

'VI. That no person shall be tried for any crime, by which he may incur an infamous punishment, or loss of life, until he first be indicted by a grand jury, except in such cases as may arise in the government and regulation of the land and naval forces.

'VII. All common law cases, between citizens of different States, shall be commenced in the common law courts

of the respective States, and no appeal shall be allowed to the Federal court, in such cases, unless the sum or value of the thing in controversy amount to three thousand dollars.

'VIII. In civil actions, between citizens of different States, every issue of fact, arising in actions at common law, shall be tried by jury, if the parties, or either of them, request it.

'IX. Congress shall at no time consent that any person, holding an office of trust or profit under the United States, shall accept any title of nobility, or any other title or office, from any king, prince, or foreign state.

'X. That no standing army shall be kept up in time of peace, unless with the consent of three-fourths of the members of each branch of Congress; nor shall soldiers, in time of peace, be quartered upon private houses, without the consent of the owner.

'XI. Congress shall make no law touching religion, or to infringe the rights of conscience.

'XII. Congress shall never disarm any citizen, unless such as are or have been in actual rebellion.

'And the Convention do, in the name and in behalf of the people of this State enjoin it upon their representatives in Congress, at all times, until the alterations and provisions aforesaid have been considered, agreeably to the fifth article of the said Constitution, to exert all their influence, and use all reasonable and legal methods, to obtain a ratification of the said alterations and provisions, in such manner as is provided in the article.

'And that the United States, in Congress assembled, may have due notice of the assent and ratification of the said Constitution by this Convention, it is *Resolved*, That the assent and ratification aforesaid be engrossed on parchment, together with the recommendation and injunction aforesaid, and with this resolution; and that John Sullivan, Esqr., President of the Convention, and John Langdon, Esqr., President of the State, transmit the same, countersigned by the Secretary of the Convention, and the Sec-

retary of State, under their hands and seals, to the United States in Congress assembled.'[1]

§ 85. *k.* VIRGINIA.—'We, the Delegates of the people of Virginia, duly elected in pursuance of a recommendation from the General Assembly, and now met in Convention, having fully and freely investigated and discussed the proceedings of the Federal Convention, and being prepared as well as the most mature deliberation hath enabled us, to decide thereon,—Do, in the name and behalf of the people of Virginia, declare and make known, that the powers granted under the Constitution, being derived from the people of the United States, may be resumed by them, whensoever the same shall be perverted to their injury or oppression, and that every power not granted thereby remains with them, and at their will; that therefore no right, of any denomination, can be cancelled, abridged, restrained, or modified, by the Congress, by the Senate or House of Representatives, acting in any capacity, by the President, or any department or officer of the United States, except in those instances in which power is given by the Constitution for those purposes; and that, among other essential rights, the liberty of conscience, and of the press, cannot be cancelled, abridged, restrained, or modified, by any authority of the United States. With these impressions, with a solemn appeal to the Searcher of all hearts for the purity of our intentions, and under the conviction that whatsoever imperfections may exist in the Constitution ought rather to be examined in the mode prescribed therein, than to bring the Union into danger by a delay with a hope of obtaining amendments previous to the ratification,—We, the said Delegates, in the name and in behalf of the people of Virginia, do, by these presents, assent to and ratify the Constitution recommended, on the 17th day of September, 1787, by the Federal Convention, for the Government of the United States, hereby announcing to all those whom it may concern, that the said Constitution

[1] Elliot's Debates, Vol. I, pp. 325–327.

is binding upon the said people, according to an authentic copy hereto annexed, in the words following.[1]

'Done in Convention, this 26th day of June, 1788.'[2]

§ 85. *l.* NEW YORK.—'We, the Delegates of the People of the State of New York, duly elected, and met in Convention, having maturely considered the Constitution for the United States of America, agreed to on the 17th day of September, in the year 1787, by the Convention then assembled at Philadelphia, in the Commonwealth of Pennsylvania (a copy whereof precedes these presents), and having, also, seriously and deliberately considered the present situation of the United States,—Do declare and make known:—

'That all power is originally vested in, and consequently derived from the people, and that Government is instituted by them for their common interest, protection, and security.

'That the enjoyment of life, liberty, and the pursuit of happiness, are essential rights, which every Government ought to respect and preserve.

'That the powers of Government may be re-assumed by the people, whensoever it shall become necessary to their happiness; that every power, jurisdiction, and right, which is not by the said Constitution clearly delegated to the Congress of the United States, or the departments of the Government thereof, remains to the people of the several States, or to their respective State Governments, to whom they may have granted the same; and that those clauses, in the said Constitution, which declare that Congress shall not have or exercise certain powers, do not imply that Congress is entitled to any powers not given by the said Constitution; but such clauses are to be construed either as exceptions to certain specified powers, or as inserted merely for greater caution.

'That the people have an equal, natural, and unalienable right, freely and peaceably, to exercise their religion, according to the dictates of conscience; and that no religious sect, or society, ought to be favored or established by law in preference to others.

[1] Here follows a copy of the instrument.

[2] Elliot's Debates, I, 327.

'That the people have a right to keep and bear arms; that a well regulated militia, including the body of the people capable of bearing arms, is the proper, natural, and safe defence of a free State.

'That the militia should not be subject to martial law, except in time of war, rebellion or insurrection.

'That standing armies, in time of peace, are dangerous to liberty, and ought not to be kept up, except in cases of necessity, and that at all times the military should be under strict subordination to the civil power.

'That, in time of peace, no soldier ought to be quartered in any house without the consent of the owner, and in time of war only by the civil magistrate, in such manner as the laws may direct.

'That no person ought to be taken, imprisoned, or disseized of his freehold, or be exiled, or deprived of his privileges, franchises, life, liberty, or property, but by due process of law.

'That no person ought to be put twice in jeopardy of life or limb, for one and the same offence; nor, unless in case of impeachment, be punished more than once for the same offence. That every person restrained of his liberty is entitled to an inquiry into the lawfulness of such restraint, and to a removal thereof if unlawful; and that such inquiry, or removal, ought not to be denied or delayed, except when, on account of public danger, the Congress shall suspend the privilege of the writ of *Habeas Corpus*. That excessive bail ought not to be required, nor excessive fines imposed, nor cruel or unusual punishments inflicted.

'That (except in the government of the land and naval forces, and of the militia, when in actual service, and in cases of impeachment) a presentment, or indictment, by a grand jury, ought to be observed, as a necessary preliminary to the trial of all crimes cognizable by the judiciary of the United States; and such trial should be speedy, public, and by an impartial jury of the county where the crime was committed; and that no person can be found guilty without the unanimous consent of such jury. But

in cases of crimes not committed within any county of any of the United States, and in cases of crimes not committed within any county in which a general insurrection may prevail, or which may be in the possession of a foreign enemy, the inquiry and trial may be in such county as the Congress shall by law direct; which county, in the two cases last mentioned, should be as near as conveniently may be to that county in which the crime may have been committed;—and that, in all criminal prosecutions, the accused ought to be informed of the cause and nature of the accusation, to be confronted with his accusers and the witnesses against him, to have the means of producing his witnesses, and the assistance of counsel for his defence; and should not be compelled to give evidence against himself.

'That the trial by jury, in the extent that it obtains by the common law of England, is one of the greatest securities to the rights of a free people, and ought to remain inviolate.

'That every freeman has a right to be secure from all unreasonable searches and seizures of his person, his papers, or his property; and, therefore, that all warrants to search suspected places, or seize any freeman, his papers, or property, without information upon oath, or affirmation of sufficient cause, are grievous and oppressive; and that all general warrants (or such in which the place or person suspected are not particularly designated) are dangerous, and ought not to be granted.

'That the people have a right peaceably to assemble together, to consult for their common good, or to instruct their representatives, and that every person has a right to petition, or apply to the Legislature, for redress of grievances.

'That the freedom of the press ought not to be violated, or restrained.

'That there should be, once in four years, an election of the President and Vice President, so that no officer, who may be appointed by the Congress, to act as President, in case of the removal, death, resignation, or inability, of the

President and Vice President, can in any case continue to act beyond the termination of the period for which the last President and Vice President were elected.

'That nothing contained in the said Constitution is to be construed to prevent the Legislature of any State from passing laws at its discretion, from time to time, to divide such State into convenient districts, and to apportion its Representatives to and amongst such districts.

'That the prohibition contained in the said Constitution, against *ex post facto* laws, extends only to laws concerning crimes.

'That all appeals in causes determinable according to the course of the common law, ought to be by writ of error, and not otherwise.

'That the judicial power of the United States, in cases in which a State may be a party, does not extend to criminal prosecutions, or authorize any suit by any person against a State.

'That the judicial power of the United States, as to controversies between citizens of the same State, claiming lands under grants from different States, is not to be construed to extend to any other controversies between them, except those which relate to such lands, so claimed, under grants of different States.

'That the jurisdiction of the Supreme Court of the United States, or of any other court to be instituted by the Congress, is not in any case to be increased, enlarged, or extended, by any fiction, collusion, or mere suggestion; and that no treaty is to be construed so to operate as to alter the Constitution of any State.

'Under these impressions, and declaring that the rights aforesaid cannot be abridged, or violated, and that the explanations aforesaid, are consistent with the said Constitution, and in confidence that the amendments, which shall have been proposed to the said Constitution, will receive an early and mature consideration; We, the said Delegates, in the name and in the behalf of the people of the State of New York, do, by these presents, assent to, and ratify the said Constitution. In full confidence, neverthe-

less, that, until a Convention shall be called and convened, for proposing amendments to the said Constitution, the militia of this State will not be continued in service out of this State for a longer term than six weeks, without the consent of the Legislature thereof; that the Congress will not make or alter any regulation in this State, respecting the times, places and manner, of holding elections for Senators or Representatives, unless the Legislature of this State shall neglect or refuse to make laws or regulations for the purpose, or from any circumstance, be incapable of making the same; and that in those cases, such power will only be exercised until the Legislature of this State shall make provision in the premises; that no excise will be imposed on any article of the growth, production, or manufacture of the United States, or any of them, within this State, ardent spirits excepted; and that Congress will not lay direct taxes within this State, but when the moneys arising from the impost and excise shall be insufficient for the public exigencies, nor then, until the Congress shall first have made a requisition upon this State, to assess, levy, and pay, the amount of such requisition, made agreeably to the census fixed in the said Constitution, in such way and manner as the Legislature of this State shall judge best; but that, in such case, if the State shall neglect or refuse to pay its proportion, pursuant to such requisition, then the Congress may assess and levy this State's proportion, together with interest, at the rate of six per centum per annum, from the time at which the same was required to be paid.

'Done, in Convention, at Poughkeepsie, in the county of Duchess, in the State of New York, the 26th day of July, in the year of our Lord, 1788.'[1]

NORTH CAROLINA.—'In Convention: § 85. *m*.

'*Whereas*, The General Convention, which met in Philadelphia, in pursuance of a recommendation of Congress, did recommend to the citizens of the United States a Con-

[1] Elliot's Debates, Vol. I, pp. 327-329.

stitution, or form of Government, in the following words, namely:[1]

'*Resolved*, That this Convention, in behalf of the freemen, citizens and inhabitants of the State of North Carolina, do adopt and ratify the said Constitution and form of Government.

'Done, in Convention, this twenty-first day of November, one thousand seven hundred and eighty-nine.'

(A set of resolutions were also passed by this Convention, recommending six amendments, the first of which is as follows:)

'1. Each State in the Union shall respectively retain every power, jurisdiction, and right, which is not by this Constitution delegated to the Congress of the United States, or to the departments of the General Government; nor shall the said Congress, nor any department of the said Government, exercise any act of authority over any individual in any of the said States, but such as can be justified under some power particularly given in this Constitution; but the said Constitution shall be considered at all times a solemn instrument, defining the extent of their authority, and the limits of which they cannot rightfully exceed.'[2]

§ 85. *n.* RHODE ISLAND.—'We, the Delegates of the people of the State of Rhode Island and Providence Plantations, duly elected, and met in Convention, having maturely considered the Constitution for the United States of America, agreed to on the seventeenth day of September, in the year one thousand seven hundred and eighty-seven, by the Convention then assembled at Philadelphia, in the Commonwealth of Pennsylvania (a copy whereof precedes these presents), and having also seriously and deliberately considered the present situation of this State, do declare and make known:—

'I. That there are certain natural rights of which men, when they form a social Compact, cannot deprive or divest their posterity,—among which are the enjoyment of life

[1] Here follows a copy of the instrument.

[2] Elliot's Debates, Vol. I, p. 333.

and liberty, with the means of acquiring, possessing, and protecting property, and pursuing and obtaining happiness and safety.

'II. That all power is naturally vested in, and consequently derived from, the people; that magistrates, therefore, are their trustees and agents, and at all times amenable to them.

III That the powers of Government may be resumed by the people whensoever it shall become necessary to their happiness. That the rights of the States respectively to nominate and appoint all State officers, and every other power, jurisdiction, and right, which is not by the said Constitution clearly delegated to the Congress of the United States, or to the Departments of Government thereof, remain to the people of the several States, or their respective State Governments, to whom they may have granted the same; and that those clauses in the Constitution which declare that Congress shall not have or exercise certain powers, do not imply that Congress is entitled to any powers not given by the said Constitution; but such clauses are to be construed as exceptions to certain specified powers, or as inserted merely for greater caution.

'IV. That religion or the duty which we owe to our Creator, and the manner of discharging it, can be directed only by reason and conviction, and not by force and violence; and, therefore, all men have a natural, equal, and unalienable right to the exercise of religion according to the dictates of conscience; and that no particular religious sect, or society, ought to be favored or established by law, in preference to others.

'V. That the legislative, executive, and judiciary powers of Government should be separate and distinct; and, that the members of the two first may be restrained from oppression, by feeling and participating the public burdens, they should, at fixed periods, be reduced to a private station, returned into the mass of the people, and the vacancies be supplied by certain and regular elections, in which all, or any part of the former members to be elig-

ible or ineligible, as the rules of the Constitution of Government and the laws shall direct.

'VI. That elections of representatives in the Legislature ought to be free and frequent; and all men having sufficient evidence of permanent common interest with, and attachment to, the community, ought to have the right of suffrage; and no aid, charge, tax, or fee, can be set, rated, or levied, upon the people, without their own consent, or that of their representatives so elected, nor can they be bound by any law to which they have not in like manner consented for the public good.

'VII. That all power of suspending laws, or the execution of laws, by any authority, without the consent of the representatives of the people in the Legislature, is injurious to their rights, and ought not to be exercised.

'VIII. That, in all capital and criminal prosecutions, a man hath the right to demand the cause and nature of his accusation, to be confronted with the accusers and witnesses, to call for evidence, and be allowed counsel in his favor, and to a fair and speedy trial by an impartial jury in his vicinage, without whose unanimous consent he cannot be found guilty, (except in the government of the land and naval forces,) nor can he be compelled to give evidence against himself.

'IX. That no freeman ought to be taken, imprisoned, or disseized of his freehold, liberties, privileges, or franchises, or outlawed, or exiled, or in any manner destroyed, or deprived of his life, liberty, or property, but by the trial by jury, or by the laws of the land.

'X. That every freeman, restrained of his liberty, is entitled to a remedy, to inquire into the lawfulness thereof, and to remove the same if unlawful, and that such remedy ought not to be denied or delayed.

'XI. That in controversies respecting property, and in suits between man and man, the ancient trial by jury, as hath been exercised by us and our ancestors, from the time whereof the memory of man is not to the contrary, is one of the greatest securities to the rights of the people, and ought to remain sacred and inviolable.

'XII. That every freeman ought to obtain right and justice, freely and without sale, completely and without denial, promptly and without delay; and that all establishments, or regulations, contravening these rights, are oppressive and unjust.

'XIII. That excessive bail ought not to be required, nor excessive fines imposed, nor cruel or unusual punishments inflicted.

'XIV. That every person has a right to be secure from all unreasonable searches and seizures of his person, his papers, or his property; and, therefore, that all warrants to search suspected places, to seize any person, his papers, or his property, without information upon oath or affirmation of sufficient cause, are grievous and oppressive; and that all general warrants (or such in which the place or person suspected are not particularly designated) are dangerous, and ought not to be granted.

'XV. That the people have a right peaceably to assemble together, to consult for their common good, or to instruct their representatives; and that every person has a right to petition or apply to the Legislature for redress of grievances.

'XVI. That the people have a right to freedom of speech, and of writing, and publishing their sentiments. That freedom of the press is one of the greatest bulwarks of liberty, and ought not to be violated.

'XVII. That the people have a right to keep and bear arms; that a well-regulated militia, including the body of the people capable of bearing arms, is the proper, natural, and safe defence of a free State; that the militia shall not be subject to martial law, except in time of war, rebellion, or insurrection; that standing armies, in time of peace, are dangerous to liberty, and ought not to be kept up, except in cases of necessity; and that, at all times, the military should be under strict subordination to the civil power; that, in time of peace, no soldier ought to be quartered in any house without the consent of the owner, and in time of war only by the civil magistrates, in such manner as the law directs.

'XVIII. That any person religiously scrupulous of bearing arms ought to be exempted upon the payment of an equivalent to employ another to bear arms in his stead.

'Under these impressions, and declaring that the rights aforesaid cannot be abridged or violated, and that the explanations aforesaid are consistent with the said Constitution, and in confidence that the amendments hereinbefore mentioned will receive an early and mature consideration, and, conformably to the fifth article of said Constitution, speedily become a part thereof,—We, the said Delegates, in the name and in the behalf of the people of Rhode Island and Providence Plantations, do, by these presents, assent to and ratify the said Constitution. In full confidence, nevertheless, that, until the amendments proposed shall be agreed to and ratified, pursuant to the aforesaid fifth article, the militia will not be continued in service out of this State, for a longer term than six weeks, without the consent of the Legislature thereof; that the Congress will not make or alter any regulation in this State respecting the times, places, and manner of holding elections for Senators or Representatives, unless the Legislature of this State shall neglect or refuse to make laws or regulations for the purpose, or from any circumstance, be incapable of making the same; and that, in those cases, such power will only be exercised until the Legislature of this State shall make provision in the premises; and that the Congress will not lay direct taxes within this State, but when the moneys arising from impost, tonnage, and excise, shall be insufficient for the public exigencies, nor until the Congress shall have first made a requisition upon this State to assess, levy, and pay, the amount of such requisition made, agreeably to the census fixed in the said Constitution, in such way and manner as the Legislature of this State shall judge best; and that Congress will not lay any capitation or poll tax.

'Done in Convention, at Newport, in the County of Newport, in the State of Rhode Island and Providence Plantations, the twenty-ninth day of May, in the year of our Lord one thousand seven hundred and ninety, and in

the fourteenth year of the Independence of the United States of America.[1]

The following extract from the Journals of Congress (under the Articles of Confederation), will show the action of that body upon the adoption of the new Constitution: § 85. a.

'In Congress, Saturday, September 13, 1788.

'On the question to agree to the following proposition, it was resolved in the affirmative by the unanimous votes of nine States, viz., of New Hampshire, Massachusetts, Connecticut, New York, New Jersey, Pennsylvania, Virginia, South Carolina and Georgia.

'*Whereas*, the Convention assembled in Philadelphia, pursuant to the resolution of Congress of the 21st February, 1787, did, on the 17th of September in the same year, report to the United States in Congress assembled, a Constitution for the people of the United States; whereupon Congress, on the 28th of the same September, did resolve unanimously, "That the said report, with the resolutions and letter accompanying the same, be transmitted to the several Legislatures, in order to be submitted to a Convention of Delegates chosen in each State by the people thereof, in conformity to the resolves of the Convention made and provided in that case:" and *whereas*, the Constitution so reported by the Convention, and by Congress transmitted to the several Legislatures, has been ratified in the manner therein declared to be sufficient for the establishment of the same, and such ratifications duly authenticated, have been received by Congress, and are filed in the office of the Secretary; therefore,

'*Resolved*, That the first Wednesday in January next be the day for appointing electors in the several States, which before the said day shall have ratified the said Constitution: that the first Wednesday in February next be the day for the electors to assemble in their several States and vote for a President: and that the first Wednesday in March next be the time, and the present seat of Congress

[1] Elliot's Debates, Vol. I, pp. 334–335.

the place, for commencing proceedings under the said Constitution.'

86. Dissolution of the old and establishment of the new union

Before the close of July, 1788, eleven of the thirteen states, namely, in the order of their action, Delaware, Pennsylvania, New Jersey, Georgia, Connecticut, Massachusetts, Maryland, South Carolina, New Hampshire, Virginia, and New York, had severally adopted the new constitution of the union, each for itself, and as a part of its own political system. Thus the first confederation of the states was peaceably dissolved, and a new one formed: not by a minority of their number, indeed, nor yet by the unanimous consent of all (as the original compact seemed to require),[1] but by a majority of more than three-fourths, and certainly sufficient for this or for any other purpose.

On Wednesday, the 4th of March, 1789, in the thirteenth year of American independence, the new government was inaugurated, and commenced operations, at the City of New York. The time of its commencement is wrapt in no mystery. In a case which presented the point for decision to the Supreme Court of the United States, Chief Justice Marshall said:—'Both Governments could not be understood to exist at the same time. The new Government did not commence till the old Government expired. It is apparent that the Government did not commence on the Constitution being ratified by the ninth State; for these ratifications were to be reported to Congress, whose continuing existence was recognized by the Convention, and who were requested to continue to exercise their powers for the purpose of bringing the new Government into operation. In fact, Congress did continue to act as a Government until it dissolved on the first of November by the successive disappearance of its members. It existed potentially until the second of March, the day preceding that on which the members of the new Congress were directed to assemble.'[2]

At this time, North Carolina and Rhode Island both stood apart from the union, each in its full political in-

[1] See Art. XIII of the Articles of Confederation.

[2] Owings *v.* Speed, *et al.*, 5 Wheat. 420–422.

tegrity, as a free, sovereign and independent state; their former union with the others having been dissolved, either with or without their consent, and they having refused or at least delayed to ratify the new constitution. The new government accordingly proceeded to deal with them, in all respects, as foreign states: to enact that the manufactures of those states should be considered as foreign, and that the acts laying a duty on goods imported, and on tonnage, should extend to them. Commerce with them was foreign commerce; and the inconveniences arising from their situations and a foreign trade with their former allies, caused them to reflect upon the advantages offered by the union, and finally to give their assent and ratification to the new constitution: their several ratifications taking place, that of North Carolina, on the 21st of November, 1789,[1] and that of Rhode Island, on the 29th of May, 1790.[2] So that, in relation to them, the present government of the United States commenced operation at different dates, and not, as with respect to the others, on the 4th of March, 1789.

## (3 A) OF THE POWER TO AMEND THE FEDERAL CONSTITUTION, AND THE SEVERAL AMENDMENTS THERETO.

§ 86. *a.* Mode of establishing the original.

The all-important question, by whom, and in what manner, the federal constitution was framed and established, is conclusively answered, and forever put at rest, the moment we turn to the records of sovereign legislation to which our attention has just been directed. That constitution was, as we have seen, framed and proposed by the sole authority of the several states;—in the words of the men who framed it, and of the instrument itself, 'Done in convention by the unanimous CONSENT OF THE STATES present.'[3] What then? by what means did it become the organic law of the union? As it came from the hands of the conven-

[1] Elliot's Debates, Vol. I, p. 333.
[2] Id. p. 334.
[3] The last section of the last article.

tion, it was a mere proposition for 'a more perfect union,' upon the terms therein contained; and 'the ratification of the conventions of nine states was to be sufficient for its establishment, between the states so ratifying the same.'[1] The convention proposed that 'it be submitted to A CONVENTION OF DELEGATES, CHOSEN IN EACH STATE BY THE PEOPLE THEREOF, under the recommendation of its legislature, for their assent AND RATIFICATION.'[2] It was accordingly so submitted, as we have seen, and finally ratified, 'ordained and established,' by conventions so chosen, and acting in their several, distinct, sovereign and independent capacities.[3]

§ 87. Mode of amending.

It might very naturally seem, that any amendment, or alteration, of this organic compact of union, should be framed and established in precisely the same way, by the very same means, and with all the precautions and solemnities, which were adopted in framing and establishing the original. And had this principle of universal law been embodied in the original itself, as it came from the hands of the general convention of the states, it might have assured the system against all innovations or changes of a purely partisan character.

The method of amendment provided by the instrument itself, is given in these words:—'The congress, whenever two thirds of both houses shall deem it necessary, shall propose amendments to this constitution, or, on the application of the legislatures of two-thirds of the several states, shall call a convention for proposing amendments, which, in either case, shall be valid to all intents and purposes, as part of this constitution, when ratified by the legislatures of three-fourths of the several states, or by conventions in three-fourths thereof, as the one or the other mode of ratification may be proposed by congress; provided that no amendment which may be made prior to the year one thousand eight hundred and eight shall in any manner affect the first and fourth clauses in the ninth sec-

[1] The concluding article.

[2] Letter of the General Convention, *ante*, § 83.

[3] See the several Ordinances of Ratification, under § 85, *ante*.

tion of the first article; and that no state, without its consent, shall be deprived of its equal suffrage in the senate.'[1]

§ 87. *a.* Its defect.

By this provision, as is seen at once, the discretionary power is given to congress, not only to frame and propose amendments of the common organic law, which amendments may wholly new-model the government of the union, and even the governments of the several states, but also the power to choose the most available mode of securing their ratification, by further proposing that the state legislatures, not the people themselves, shall finally act upon them: a mode of ratification which, however conformable to the nature of the union under the original articles of confederation, which articles were sanctioned only by the state legislatures, is wholly at variance with the principle of the sovereignty of the people of each state, on which the union is at present founded. It should be observed, that the power to *word* and *propose* amendments, expressive of the sovereign will, is a *positive* and not a negative power, in itself of the highest importance, and one in the exercise of which, all the means and precautions that could have insured a truthful expression of the will of the sovereigns, should have been rendered constitutionally necessary. The power to *reject* proposed amendments, is a *negative* power; and it amounts to nothing except a power to *prevent* amendments. Add to this, that not even the safeguards of the state constitutions, respecting either the concurrence of two successive legislatures in the proposal of amendments, or the popular mode of ratification, have been preserved. The binding force of the original articles of union, was often questioned, because they 'never had a ratification by the people.'[2] It was urged that delegated powers could not be re-delegated by those to whom delegated. Of what greater force are amendments, made by the state legislatures, and never submitted to the people? An amendment to the federal

[1] Const. U. S. Art. v.

[2] The Federalist, No. 22, p. 108; No. 43, p. 205.

constitution, may have (or assume to have) the effect to wholly divest the PEOPLE of each state of the absolute sovereignty, the supreme control of the right of suffrage, and render its further exercise permanently dependent upon the will of their federal representatives; as in the case of the fifteenth amendment to that constitution.[1] Will any pretend that such an amendment, an *amendment* that *destroys*, can have the force of an *organic* expression of the sovereign will by the PEOPLE themselves? If so, he must be prepared to maintain, that, under the constitution, the delegated power is superior to the original and inalienable sovereignty of the people, by virtue of which it exists; the created is above the creator; the GOVERNMENT rises to ABSOLUTE POWER, and the PEOPLE sink to the condition of SLAVES. If he cannot maintain this doctrine, he will have to admit that amendments so made, can have no effect upon the paramount sovereignty of the people. The sovereignty of government, or the sovereignty of the people, the one or the other, must inevitably prevail.

§ 87. *b.* A limit to the power of amendment.

In a union of states, as was formerly shown, the essential internal sovereignty of each, being inalienable, is reserved to itself. This fixes a limit to the power of amendment. Not even the people themselves can alien their essential liberty or sovereignty, so as to vest it in their political government, and make that government sovereign. This is the fundamental principle of our political system. How then can their government, not their government but the legislative branch of their government, divest the people of their essential sovereignty? or, which is the same, confer upon another people, or another government, those original powers which it does not possess and cannot control? Suppose the people of this country were one political body, one single state, with one constitution, and one government; and that government were empowered to amend the constitution. Would any amendment, divesting the people of the paramount sovereignty, and vesting it in the government, or in any other people

[1] See *post* §§ 164 to 172.

or government, be a valid amendment? So long as we adhere to the principle of the sovereignty of the people, there must, as is obvious, be this limitation to the power of amendment.

An unlimited power to amend or change the constitution, as vested in government or any or all of the departments of government, means nothing else than the paramount sovereignty of government itself, and the unlimited subjection of the people thereto. Under a government possessed of such power, the right of suffrage, the essence of the sovereignty of a people, ceases to be a right, and becomes a mere privilege: the government itself is the source, and the only source, of the highest rights which the people can enjoy.

Let us for a moment observe the sovereign conflict here involved. Not any single one of the state legislatures, nor all of them combined, can change the constitution of a particular state, by way of amendment thereto. And why is this? Because the people, in each and in all of the states, designed to establish and firmly secure the fundamental principle of constitutional government; that 'All power is inherent in the people, and all free governments founded in their authority.' But *three-fourths* of the state legislatures, by way of amendment to the federal constitution, may wholly abolish the state constitutions, the state governments, and even the states themselves!!! Is it sought to avoid this paramount political absurdity? Then a *limit* to the power of amendment must be assumed. And what is that limit? It can be none other than that which is furnished by our fundamental political maxim, that 'All power is inherent in the people, and all free governments founded in their authority;' from which it obviously follows, that no amendment can ever be made to our constitutions, which in any way affects the paramount sovereignty, or changes the basis of the political system. Assuming that our union is a union of republican states, that is, of political communities, each of which communities consists of a body of electors in whom the supreme power resides, no amendment to the federal

constitution, or even to the state constitutions, can ever be made, which affects the right of each body of electors to make and prescribe the election law that governs the expression of their sovereign will; for the right to make and prescribe that law, is of the essence of their political existence, and cannot be exercised by another authority, except to their own destruction, and the consequent destruction of the basis of the union. Assuming that, on the other hand, our union is a union of all our people in a single republican state, that is, in one political community, consisting of a single body of electors in whom the supreme power resides, no amendment to their constitution can then be made, which affects their right to make and prescribe their election law; because, if that right be vested in their government, they cease to be sovereign, the government becomes sovereign, the foundation is destroyed, and the system overturned. If that right be vested in another people or another government, the same result must as certainly follow.

§ 88. Impolicy of amendments.

Against the policy of changing our original constitutions, very strong reasons were furnished by those to whom we owe them. 'Notwithstanding the success which has attended the revisions of our established forms of government, and which does so much honor to the virtue and intelligence of the people of America, it must be confessed, that the experiments are of too ticklish a nature to be unnecessarily multiplied. We are to recollect, that all the existing constitutions were formed in the midst of a danger which repressed the passions most unfriendly to order and concord; of an enthusiastic confidence of the people in their patriotic leaders, which stifled the ordinary diversity of opinions on great national questions; of a universal ardor for new and opposite forms, produced by a universal resentment and indignation against the ancient government; and whilst no spirit of party, connected with the changes to be made, or the abuses to be reformed, could mingle its leaven in the operation. The future situations in which we must expect to be usually placed, do not pre-

sent any equivalent security against the danger which is apprehended."[1]

It is worthy of remark, that not till within a very recent period, were amendments ever proposed, or sought to be made, by a *dominant faction* or *political party*. For seventy years, the spirit of party, against 'the *baneful* effects' of which the immortal Washington warned his countrymen,[2] had never made or attempted to make its partisan schemes a part of the organic law; a precedent which, if pursued, must end in our political self-destruction, had not been given. At length, however, we have a series of amendments, proposed by the *dominant party in congress*, and carried through the state *legislatures*, not only by *a strict party vote* in each, but also, in some, by means of a power assumed by congress to 'reconstruct' the states! *Another* political party, *sooner or later*, will come into power. What then? The *constitution* must be amended, and made to express *their* partisan views! Where then is our boasted security against the tyranny of factions and majorities? Or is the tyranny of two or three hundred congressional despots, to-day of one party, and to-morrow of another, to take the place of our constitutional government!

§ 89. Amendments now established.

The several amendments to the federal constitution, which now form part of that instrument, are the following:

## AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

ARTICLE I. Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble and to petition the government for a redress of grievances.[3]

[1] The Federalist, No. 49, p. 234. See also § 82, *ante*.

[2] Washington's Farewell Address.

[3] The first *ten* of these amendments may be considered as parts of the *original*, having in substance been proposed by the states at the time of their adopting the constitution. See the amendments proposed in the Ordinances of Ratification, *ante*, §§ 85 to 86.

ART. II. A well-regulated militia being necessary to the security of a free State, the right of the people to keep and bear arms, shall not be infringed.

ART. III. No soldier shall, in time of peace, be quartered in any house without the consent of the owner; nor in time of war, but in a manner to be prescribed by law.

ART. IV. The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated; and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

ART. V. No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia when in actual service in time of war or public danger; nor shall any person be subject for the same offence, to be put twice in jeopardy of life or limb; nor shall be compelled, in any criminal case, to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

ART. VI. In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the assistance of counsel for his defence.

ART. VII. In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved; and no fact tried by jury shall be otherwise re-examined in any court of the United States than according to the rules of the common law.

ART. VIII. Excessive bail shall not be required, nor ex-

cessive fines imposed, nor cruel and unusual punishments inflicted.

ART. IX. The enumeration in the Constitution of certain rights, shall not be construed to deny or disparage others retained by the people.

ART. X. The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.[1]

ART. XI. The judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign state.[2]

ART. XII. SEC. 1. The electors shall meet in their respective States, and vote by ballot for President and Vice President, one of whom, at least, shall not be an inhabitant of the same State with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice President; and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice President, and of the number of votes for each, which list they shall sign and certify, and transmit sealed to the seat of government of the United States, directed to the President of the Senate: the President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates, and the votes shall then be counted; the person having the greatest number of votes for President shall be the President, if such number be a majority of the whole number of electors appointed; and if no person have such majority, then from the persons having the highest number, not exceeding three, on the list of those voted for as President, the House of Representatives shall choose immediately by ballot the President. But in choosing the President, the votes shall be taken by States, the representation from each State having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of

[1] These, the first ten amendments, were ratified in 1791.
[2] Adopted in 1798.

the States, and a majority of all the States shall be necessary to a choice. And if the House of Representatives shall not choose a President whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the Vice President shall act as President, as in the case of the death or other constitutional disability of the President.

SEC. 2. The person having the greatest number of votes as Vice President, shall be the Vice President, if such number be a majority of the whole number of electors appointed; and if no person have a majority, then from the two highest numbers on the list, the Senate shall choose the Vice President: a quorum for the purpose shall consist of two-thirds of the whole number of senators, and a majority of the whole number shall be necessary to a choice.

SEC. 3. But no person constitutionally ineligible to the office of President shall be eligible to that of Vice President of the United States.[1]

ART. XIII. SEC. 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

SEC. 2. Congress shall have power to enforce this article by appropriate legislation.[2]

ART. XIV. SEC. 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person

[1] 'At the fourth Presidential election, Thomas Jefferson and Aaron Burr were the democratic candidates for President and Vice President. By the electoral returns they had an even number of votes. In the House of Representatives, Burr, by intrigue, got up a party to vote for him for President; and the House was so divided that there was a tie. A contest was carried on for several days, and so warmly, that even sick members were brought to the House on their beds. Finally one of Burr's adherents withdrew, and Jefferson was elected by *one* majority—which was the occasion of this twelfth article.' Adopted in 1804.

[2] Adopted in 1865.

of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

SEC. 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, representatives in Congress, the executive and judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

SEC. 3. No person shall be a senator or representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may, by a vote of two-thirds of each House, remove such disability.

SEC. 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such

debts, obligations, and claims, shall be held illegal and void.

SEC. 5. Congress shall have power to enforce, by appropriate legislation, the provisions of this article.[1]

ART. XV. SEC. 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States, or by any State, on account of race, color, or previous condition of servitude.

SEC. 2. Congress shall have power to enforce this article by appropriate legislation.[2]

---

### (3 *g a*) OF THE POLITICAL SYSTEM ESTABLISHED BY THE ORGANIC LAW: AND HEREIN, FIRST

### (1 *h a*) OF THE STATES AS BODIES POLITIC, OR THE 'PEOPLE' AS ELECTORS.

§ 90. Distribution.

THE LEGISLATIVE POWER OF THE PEOPLE, the original warrant and sovereign authority for the constituted order of things, has now been traced in all the modes of procedure which resulted in establishing the organic law, or political constitutions, of the several states and of the United States. It remains to be traced, examined and considered, as it appears in the POLITICAL SYSTEM, to which that law or those constitutions have given birth. And here, in the investigation of that system, as a constituted order of *political* relations, I shall examine the nature and character, first, of the STATES AS BODIES POLITIC; secondly, of the UNION of the states; and thirdly, of CITIZENSHIP of the states and of the United States.

§ 91. Who compose the political states.

'THE BODY POLITIC,' says one of our state constitutions, 'IS FORMED BY A VOLUNTARY ASSOCIATION OF INDIVIDUALS. It is a social compact, by which the whole people covenants with each citizen, and each citizen with the whole people,

[1] Adopted in 1868.
[2] Adopted in 1870.

that all shall be governed by certain laws for the common good.'[1]

The right of SELF-GOVERNMENT, considered as a *natural* right, equally inheres in every individual of the human race. And thus the original source and unfailing fountain of every species of political authority, is MAN himself, HUMANITY. But since the human race must be divided into many different political societies; and since each of these societies must have a right to govern itself, it follows, as of course, that each must have a right to determine what character of persons shall be of its number, and to prescribe the conditions upon which its members shall have a voice in its common government. There must, then, in every political society, be some who are clothed with the absolute sovereignty, and some who are excluded therefrom; some who are members of the *political* state, and some who are members of the *civil* state merely. It is simply impossible that all should be clothed with *political* authority; whether in an equal, or in an unequal degree: however true it may be that all are equal in *natural* right. In a system of popular government, such as are members of the *political* state, can only be identified and known as *a body of political co-equals;* that is, as *a body of electors;* who compose *the political state*, as distinguished from the mass of *citizens*, who are members merely of the *civil* state, and have no voice in public affairs. Thus a state or political community, such as one of the United States, is a body of political co-equals, commonly called 'the people,' in whom, as electors, the paramount sovereignty, or supreme and uncontrollable authority, at all times resides, and whose sovereign will, as expressed and proclaimed by them in their written constitution of government, is their organic law, and the bond of their political existence. The United States are therefore a community of such states, united by a federal constitution, and a general government founded therein. This is the doctrine held by the Supreme Court of the United States. 'A State,' says that court, 'in the ordinary sense of the [Federal] Constitution,

[1] Const. Mass. Preamble.

is *a political community of free citizens*, occupying a territory of defined boundaries, and organised under a government sanctioned and limited by a written Constitution and established by the consent of the governed. It is the Union of such States, under a common Constitution, which forms the distinct and greater political unit which that Constitution designates as the United States.'[1]

§ 92. Who 'the people' are.

It is the fundamental maxim of each of our state constitutions, that 'all political power is inherent in the people;' that is, in 'the people' as the *body of electors* composing the political state; for no distinction exists between a *state* and *'the people'* of a state, in the sense of that maxim. By a *state*, we do not mean the *government* of a state, much less do we mean the legislature, the executive, or the judiciary of a state; we mean *the citizen-electors who compose the state, and who are*, so to speak, *integral parts of it, altogether forming a body politic.*[2] By 'THE PEOPLE,' speaking of the people in their political character and capacity, none other is or can be properly meant, than THE BODY OF ELECTORS, the political state itself; this body being the original and only source of political power, the life and soul of the civil state, and the only body or state that can ever exist as absolutely sovereign, free and independent, in any system of government by the people. Indeed, no other sort or kind of *political* society or state, than this, on the one hand, of a sovereign body of electors, and that on the other, of a union or confederation of such sovereign bodies, has ever been known in our American political system. And hence it is clear, that the phrase 'WE, THE PEOPLE,' as used in the constitution of a state, means WE, THE BODY OF ELECTORS of or composing the state; and as used in the constitution of the United States, means WE, THE BODIES OF ELECTORS, of or composing the United States.[3]

[1] Texas *v.* White, 7 Wall. 721.

[2] 3 Dall. 93—*per* Justice Iredell.

[3] See the original reading of the Preamble, § 109. As a notable instance of the variation in the meaning of words and phrases, so often

In such a system it necessarily follows, that all the powers of a public nature or political character, enumerated and defined as powers of government, can be nothing more than *delegated* powers, confided to agents chosen by and from among the electors themselves for government purposes; powers not of right belonging to government or public officials, but belonging to the sovereigns themselves, the single body, or several bodies, of electors, whose will alone is law. No government, therefore, in such a system, can claim to be sovereign, or claim to exist by virtue of any inherent power; the powers which are delegated to it, however high and sovereign in their nature and source, being contingent, and liable at all times to be wholly resumed and otherwise vested by the several bodies of electors, who themselves are the absolute sovereigns.

effected by the changing current of events, we may note the fact that the *name* of our federal union did not, as originally employed, convey the various meanings which, to a greater or lesser extent, are now associated with it. '*The United States of America*' was first adopted as the proper name of the original Confederation of the States, by the Congress of 1776. It originally meant, not the states themselves, nor the people of America, nor any *single* political body, but the *confederacy*, THE LARGER SOCIETY OF WHICH EACH STATE IN ITS SOVEREIGN CHARACTER AND CAPACITY BECAME A MEMBER. And such indeed is now its meaning, and its only meaning in our political law. So, in like manner, 'The people of the United States,' originally meant and properly means *the bodies of electors composing the States United*. The UNION referred to was and yet is, not a union of individuals, but one of *sovereign political communities* as such. The *people* or *peoples* composing these sovereign communities, not the people of America as consolidated or compounded into one common mass, were and are yet intended by 'The people of the United States.' The union formed was just such a union as might have been formed, or may yet be formed, of any other sovereign and independent states. The principle involved may be aptly illustrated by extending the scheme to all civilized states. Suppose, then, a United States of the civilized world. This might be established, just as our union was established, by each state assenting thereto. The principle would be the same. Would each remain sovereign? Would the government of such union absorb all power? Certainly each would continue sovereign concerning such affairs as peculiarly related to itself. It could not otherwise exist as a state. *Principiis obsta.*

§ 93. The 'people' sovereign.

If it be, as we have seen it is, the fundamental principle of our constitutions, that 'all political power is inherent in and derived from the people,' it is necessary to end with the verification of this principle, in every view of our political system; or contradiction, confusion, and failure in the science, and consequently injustice in the practice, of government, must be the result. Now it has never been questioned, and cannot be denied, that the word 'PEOPLE,' in our constitutions, means ELECTORS. It is equally certain that there are, in our system, as many separate and independent bodies of electors, as there are states in the union. It must therefore be admitted as an unquestionable truth, that under our constitutions, the paramount sovereignty, the supreme, unlimited, and uncontrollable authority, resides in 'the people' AS SEPARATE AND INDEPENDENT BODIES OF ELECTORS OR STATES. Indeed! of what validity would be those original ordinances of ratification designed to ordain and establish the federal constitution, if traceable to any authority not absolutely sovereign and supreme? Why speak of the adoption and ratification of the recent amendments to that constitution, if the state legislatures, to which they were submitted, represented authorities or powers subordinate to any other power? Why ask the states, either by themselves or their representatives, to ratify a proposed amendment, if they be not the source of all power and authority, superior to, able to create, and competent to destroy, the union and the government of the union?[1]

§ 94. 'The people' determine their own *status*.

The constitution of the United States, neither declares who 'We, the people,' are, nor prescribes the rights or privileges of electors, nor confers upon government, state or federal, any authority in this respect. It is wholly silent on the subject, further than to adopt the provisions of each state constitution, by declaring that 'the electors [of representatives in Congress] shall have the qualifications requisite for electors of the most numerous branch of

[1] On the sovereignty of the people of the states, see *post*, §§ 134–136.

the state legislature.'[1] No power is given to the federal government, the exercise of which can ever affect the question, who electors shall be, or what their rights or qualifications. In each of the several states, the body of electors, who constitute the political state, determine for themselves, and have always determined and held the right to determine, what character and description of persons shall be of their number. The regulation of this, in its very essence the first and highest of sovereign rights, is one of the powers which 'the people' of each state have always reserved to themselves; and so reserved for the best of reasons; — that *if once the sovereign cedes his right to determine who the sovereign rightfully is, he can thence no longer be sovereign;* he cedes the highest attribute, the very essence of sovereignty itself, and sinks himself to the level and condition of a subject. He cannot therefore cede this right. No greater absurdity could well be conceived, than that the sovereign should first create the government, and then this creature turn to work and create its creator.[2]

Here, then, we find the SOVEREIGN, and the only sovereign that can ever be known in any system of self-government. This SOVEREIGN is, in each of the states, the BODY OF ELECTORS, which we call the political state. Hence we say, the STATE is sovereign, and our political union, A UNION OF SOVEREIGN AND INDEPENDENT STATES; which is the same as to say, it is A UNION OF SOVEREIGN AND INDEPENDENT BODIES OF ELECTORS. All the confusion of ideas, all the disagreements and conflicting views and opinions, concerning our political system, may be traced to the simple fact that its cardinal principle, that 'all power is inherent in the people' as sovereign and independent bodies of electors, has been either wilfully or ignorantly perverted. In what manner or capacity have 'the people' invariably acted, from the first to the last of their sovereign enact-

[1] Const. U. S. Art. I, § 2, 1.

[2] And yet,—behold the *reconstruction* of the *states* by the *federal government!* Perhaps it is prudent to fear, that the trial of the theory of self-government in America, will afford in the end an unanswerable argument in favor of monarchy.

ments? Behold the records! Not one of these records is that of an act of 'the people of America,' 'the people of the United States,' or 'the nation,' in the character or capacity of *a single political body*. From the first to the last, all that has ever been done by any authority, has been done by authority of the several bodies of electors, composing and being the several states. Not a measure of the Revolution can be instanced, the authority for which is not ultimately found in the separate and independent action of one or more of these several bodies of electors. Nor has any other law than the constitution of each state, that is, of each several body, ever determined who these electors at any time were or might thereafter be.

§ 94. *a.* A power of congress.

In this connection, it is proper to notice the clause of the federal constitution, concerning the power of congress to make or alter regulations affecting *elections*. 'The *times, places* and *manner* of *holding elections for senators and representatives* [in congress], shall be prescribed in each state by the legislature thereof: but congress may at any time by law make or alter such regulations, except as to the *places* of choosing senators.'[1] This, be it observed, is a delegation of power to congress, to 'make or alter such regulations' as 'shall be prescribed in each state by the legislature thereof' concerning 'the *times, places* and *manner* of *holding elections for representatives*, and the *times* and *manner* of *holding elections for senators*,' in the congress of the United States; and as such, is equivalent to a positive denial of the power of congress, 'to make or alter such regulations' as concern neither 'the times, places and manner of holding elections for representatives,' nor 'the times and manner of holding elections for senators,' in congress. And this confirms the proposition, above laid down, that no power is vested in the federal government, the exercise of which can ever affect the question, who the *electors* shall be, or what their rights or qualifications.

The reason for granting to congress the power of regu-

[1] Const. U. S. Art. 1, § 4.

lating elections for members of that body, was, that an exclusive power of regulating elections for the federal government, in the hands of the state legislatures, would leave the existence of the union entirely at their mercy.[1] But as no power was given, or could be given, to *compel* an election by the people, nothing was accomplished.

'Suppose an article had been introduced into the constitution, empowering the United States *to regulate the elections for the particular states*, would any man have hesitated to condemn it, both as an unwarrantable transposition of power, and as *a premeditated engine for the destruction of the state governments*?'[2]

§ 95. Importance of regulations of the rights of electors.

It is simply self-evident, as a primary condition of a union of states, that the people of each state, who themselves are the sovereign, must hold the paramount sovereignty of the country, as, and in the character and capacity of, a self-organized and self-existent body,—that is to say, in the character and capacity of electors,—or forever cease to be the source of power. To interfere with the sovereign right of each body of electors, to determine who, or what character and description of persons, shall be of their number, is to strike at the heart of the sovereign himself; and therefore ought to be judged and punished as the highest treason to the country and to the liberties of the people.

'In a democracy,' as Montesquieu says,[3] 'there can be no exercise of sovereignty but by the suffrages of the people, which are their own will; now the sovereign's will is the sovereign himself. The laws therefore which establish the right of suffrage, are fundamental to this government. And indeed, it is as important to regulate in a republic, in what manner, by whom, to whom, and concerning what, suffrages are to be given, as it is in a monarchy to know

[1] The Federalist, No. 59, p. 278.

[2] Ibid. HAMILTON. On the power of congress to regulate elections of its members, see the Federalist, No. 60, where it is fully considered, and the idea also entertained that its abuse would lead to '*a revolt of the great body of the people, headed and directed by the state governments.*'

[3] Spirit of Laws, b. 2, c. 2.

who is the prince and after what manner he ought to govern.' The same profound and original writer, relating what Libanius says,[1] 'that at Athens a stranger, who intermeddled in the assemblies of the people, was punished with death,' gravely adds, 'this is because such a man usurped the rights of sovereignty.'

The federal constitution declares, as we have seen,[2] that 'the electors [of federal representatives] in each state shall have the qualifications requisite for electors of the most numerous branch of the state legislature.' Whatever, therefore, the rule adopted by a particular state, as to the qualifications of electors of representatives to the house of representatives of that state, the same rule applies as to electors of representatives to the house of representatives of the United States. Of this provision of the federal constitution, *The Federalist* says:—'The definition of the right of suffrage is very justly regarded as a *fundamental article* of republican government. It was incumbent on the convention, therefore, to define and establish this right in the constitution.[3] To have left it open for the occasional regulation of congress would have been improper for the reason just mentioned'—that it is 'a *fundamental article* of republican government. To have submitted it to the legislative discretion of the states, would have been improper for the same reason; and for the additional reason, that it would have rendered too dependent on the state governments, that branch of the federal govment which ought to be dependent on the people alone. To have reduced the different qualifications in the different states to one uniform rule, would probably have been as dissatisfactory to some of the states, as it would have been difficult to the convention. The provision made by the convention appears, therefore, to be the best that lay within their option. It must be satisfactory to every state;

[1] Declam. 17 & 28.

[2] Art. I, § 2.

[3] Not 'to *define* and *establish* this right,'—which the convention never attempted to do,—but to *adopt some rule* concerning it, so far as related to representatives in the federal legislature; which the convention did.

because, *it is conformable to the standard already established, or which may be established, by the state itself.* It will be safe to the United States; because, being fixed by the *state constitutions*, it is not alterable by the state governments, and it cannot be feared that the people of the states will alter this part of their constitutions, in such a manner as to abridge the rights secured to them by the federal constitution.'[1]

§ 96. Difference of state constitutions as to qualifications of electors.

In relation to this subject, however, the several provisions of the state constitutions are so various and dissimilar, that it is impracticable to recite them at length or to reduce them to general propositions containing their substance. In one particular, they all agree; that is, in the exclusion of women and minors from the electoral body: and though every male citizen of twenty-one years of age, or upwards, excepting paupers, vagrants, and certain others, are admitted to this body in some of the states, the exclusion till recently generally extended to all but those of the blood of 'ourselves and our posterity,' 'to secure the blessings of liberty to whom,' originally was, and still is, the expressed object of many of our state constitutions, as well as of the constitution of the United States.

§ 97. Office of electors.

The importance of the elective franchise, is very different in different political systems. In ours, it can only be well understood by considering the sovereign office of a body of electors. To this body belongs, all the rights and prerogatives of an absolute sovereign. It is charged with the highest of sovereign duties known to the political state,—the duty of FINAL DECISION as to how, by what laws, and by what agents or agencies the government shall be administered. In the discharge of this duty, its counsels and efforts are directed chiefly to the attainment of two ends: first, the framing and establishing of the organic law, and the improvement and perfection thereof by means of such amendments thereto as from time to time may appear to be necessary; secondly, the prevention of such as

[1] The Federalist, No. 52, p. 243.

are intrusted with authority thereunder from becoming oppressors, by causing their seasonable return to private life, and investing others with the official trusts which have thus become vacant, through stated and regular elections.[1]

The members of this body, are not only collectively sovereign, considered in relation to other political states, but are also severally and equally sovereign, considered merely in relation to each other. They are sovereign coequals: no one can be subject to any other law than that which flows from their common consent; and no one is bound except by the original covenant of their organization, by which the voice of a given majority is to be considered as the voice of all; so far, however, and only so far, as it relates to those objects in which all alike are equally concerned: for even here, certain inherent and inalienable rights are reserved to every individual; such at least as are always essential to the enjoyment of life, liberty, and property.

Each is, moreover, charged with a sovereign duty, a duty the faithful and vigilant performance of which, is the only means of securing, maintaining and defending, not only the liberties of his fellow countrymen, but also the rights and privileges which he himself enjoys. This duty is none other than that which a sovereign owes to his people and himself. If, knowing the frailties of human nature, he finds it neither prudent nor safe to abandon the idea of a government of laws, founded in his own free will and consent expressed in written constitutions, and the solemn oaths of all his ministers to uphold and maintain them forever inviolate, he should doubtless possess a thorough and accurate knowledge, and, at all times, a clear and unclouded memory, not only of the political questions of his time, but also of the fundamental laws in which his will has been declared, and the nature and extent of his own inherent prerogative rights have been ascertained and defined. If a man know not his rights, he may be said to have no rights. If he know nothing of the nature of sov-

[1] See Bill or Declaration of Rights, *ante*, p. 81, No. 5.

ereign command, or of the principles of political government, it matters not what he be called; unfit to be even a subject, he sinks to the condition of a slave; that which through ignorance a man cannot but become, and so long as in ignorance cannot but remain.

§ 98. Suffrage universal or limited.

If we consider how small a proportion of the people, in any age or country, possess the rare yet requisite qualifications for the discharge of the duties of citizen-sovereigns, the vast importance of those regulations which relate to the qualifications of electors, cannot but be evident; and we shall possibly be led to doubt the solidity of the doctrine of *universal suffrage*, that all the citizens of a state, regardless of character and number, are naturally, severally, and equally entitled to a voice, in every resolution of the sovereign will. As an abstract principle of natural law,—that is, as a principle applicable only to men considered apart from political society and positive laws,—it must be admitted that all men are naturally equal in right, and are, therefore, severally and equally entitled to a voice in matters of common concern. But when we examine the question of suffrage in relation to a political system, we always find that *some* of the citizens must be excluded from the body of electors; and that the question, what qualifications shall be sufficient to entitle a man to a voice in the sovereign resolutions of that body, must always be a question for that body of sovereigns themselves to determine: their jurisdiction in this particular, being essential to their self-existence as a political society or state.

§ 99. Universal suffrage the ruin of republics.

It was a doctrine of Montesquieu, the acknowledged prince of political writers, that in republics, it is an *essential* point to fix the *number* of citizens who are to form the public assemblies. 'At Sparta,' he observes, 'the number was fixed at ten thousand. But Rome, designed by Providence to rise from the weakest beginnings to the highest pitch of grandeur; Rome, doomed to experience all the vicissitudes of fortune; Rome, who had sometimes all her inhabitants without her walls, and sometimes all Italy

and a considerable part of the world within them; Rome,' he says, 'never fixed the number; *and this was one of the principal causes of her ruin.*'[1]

It would seem to be essential to everything human, that it contain the element of its own destruction. Republics are founded in the natural equality of men. They therefore tend to the destruction of all distinctions between their citizens; the unlimited extension of the right of suffrage; and the entire equality of political opinions. The judgment expressed by the vote of one must be of equal authority with that expressed by the vote of another. If the wise and virtuous control the ignorant and vicious, the idea of equality is abandoned, the commonwealth saved. If the ignorant and vicious prevail, neither justice nor virtue, but fraud, corruption, bribery and perjury, fill the highest public trusts.

Thus republics are doomed to fall by the very extension of the liberty they enjoy.

During the elevation and splendor of the Athenian power, the residence of foreigners, and especially of merchants, we are told, was encouraged; but the privilege of a citizen of Athens, was deemed a very distinguished favor. It could only be obtained by the consent and decree of two successive assemblies of the people, and was granted to none but to men of the highest rank and reputation, or who had performed some signal service to the republic.[2] The privilege of a citizen of Rome, was also held at first in equal esteem. But towards the decline and fall of this, the grandest type of worldly powers, all Roman citizens were equal, and all subjects of the empire citizens of Rome. That inestimable character was thence degraded to an obsolete and empty name.[3]

§ 100. A possible remedy.

Perhaps against this inherent impulse to self-destruction, which is naturally common to all republics alike, a partial

[1] Spirit of Laws, b 2, c 2.

[2] See Potter's Greek Antiq. Vol. I, pp. 44–45; 150.

[3] Gibbon's Decline and Fall of the Roman Empire. Lond. Ed. 1825, Vol. 3 c. 44, p. 188.

remedy is found in dividing up each body of state electors into a very great number of smaller bodies for election purposes. Each state is generally divided into counties and cities; counties and cities into townships and wards; townships and wards into lesser election divisions: the whole body of electors composing a state, being thus divided into a great number of smaller bodies, for the purpose of polling and ascertaining their votes. This of itself is a great security against the evils of universal suffrage. But every one knows, if at all familiar with the history of popular elections, that something yet remains to be done, if the evils they engender are ever to be overcome. The constant recurrence of election frauds may possibly be checked, by a wise and judicious system of registration—if such a system be possible. But frauds are not the only evil, nor perhaps the greatest evil, of an unlimited extension of the right of suffrage: for, however much the cry of frauds is raised by every unsuccessful party; wherever the opposing parties have an equal opportunity of watching each other, as is always the case in our elections, the frauds on the one side will generally be found to balance those on the other. The greatest evil of universal suffrage is found in the fact, that it lowers the standard of that peculiar political virtue, whatever it may be, which is essential to the preservation of the original institutions of a state, which always marks the glorious period in life of every republic, and the depreciation of which is the signal of decay. Against this evil, no remedy is found, unless in the partial abandonment of the popular suffrage scheme, and the establishment of two or more orders of electors, the lower being open for the admission of all citizens alike, and the higher being elected by and from among the lower,—as in the case of presidential electors,—and being clothed with the exclusive power of nominating as well as of electing all public officers, and being sufficiently numerous (say as one to thirty or more of the inhabitants) to prevent the intrigue and corruption of its members. All the advantages of universal suffrage,

and ample security against its evils, might possibly thus be attained.

### (2 *h a*) OF THE NATURE AND CHARACTER OF THE UNION —THE ABSOLUTIST OR IMPERIAL THEORY.

§ 101. The primary question.

UNDER this head I shall first and particularly inquire, What was the grand idea in establishing 'the new constitution' of the United States? Was it to form A UNION OF STATES, or to form A UNION OF INDIVIDUALS? 'to form *a more perfect union*' *of many independent commonwealths*, which were theretofore *imperfectly* united, or to form *a single political state* composed of the whole body of the American people?

In order to a clear understanding of this question, we must have in our minds a fixed idea of what is properly meant by a STATE. We have said that the term, STATE, in our political system, means a body of political co-equals, in whom, as electors, the paramount sovereignty, or supreme and uncontrollable authority, at all times resides, and whose sovereign will, as expressed and proclaimed by them in their written constitution of government, is their organic law, and the bond of their political existence. It will be observed, that the sovereign will of such a body, expressed in its constitution, and executed as expressed, is its political sovereignty; which differs only from its natural sovereignty, in the fact that it is so expressed and executed; that therefore it exists, as a political organization, by virtue alone of its political sovereignty; that it is (politically) SELF-EXISTENT; that it exists and acts by its own, and not by some other will; and that each of the political co-equals or members of which it is composed, speaks his will, votes at elections, as one of the body of original and absolute sovereigns, by virtue of the organic law of that body, and independently of any extraneous authority. The primary question therefore is, Does there

exist, under the constitution of the United States, *more than one* of such political bodies?

The question admits of only two answers; and all agree that the answer to this primary question, must decide the character of our political system, and, indeed, every other question of principal importance connected therewith. If we affirm that in our system, there is only ONE of such political bodies, we are bound to maintain the IMPERIAL theory, that the United States are ONE EMPIRE, call them a NATION, or whatever we please. If we say there is MORE THAN ONE, we must then adhere to the FEDERAL theory, that the United States are A COMMUNITY OF SUCH BODIES, united by a FEDERAL constitution, and a COMMON GOVERNMENT founded therein. A particular examination of each of these theories, and of the facts and arguments in support of each, is, as is obvious, essential to a just conclusion with respect to either. Indeed, a clear understanding of both is absolutely essential, on many occasions, to a proper apprehension of political questions, and, therefore, of the views and opinions of our courts of last resort, whenever such questions are before them. It is not too much to say, that a person who is ignorant of either of these theories, or of the grounds on which they severally rest, will never be able to fully understand a judicial decision, in which the rights or powers of government, state or federal, are drawn in question. Nor is it too much to say, that neither has yet been as fully examined in all its bearings, as to admit of no further elucidation.

§ 102. The imperial theory.

One of the latest among our political writers, a writer whose abilities are nowhere questioned and nowhere excelled, has given to the public a masterly work in support of the 'national' or (as I think it more appropriately termed) IMPERIAL or ABSOLUTIST theory.[1] His doctrine is

[1] 'An Introduction to the Constitutional Law of the United States. By John Norton Pomeroy, LL.D., Dean of the Law School, and Griswold Professor of Political Science in the University of New York.' 1868. I take the peculiar theory in question at the hands of this eminent author, because I find it nowhere else so strongly and clearly presented. It is ably argued however by many others, and generally held by the

stated in the following propositions: 'That THE PEOPLE of the United States is AN INDEPENDENT POLITICAL SOCIETY, WITH ITS OWN ORGANIZATION AND GOVERNMENT, POSSESSING IN ITSELF INHERENT AND ABSOLUTE POWERS OF LEGISLATION; that IT KNOWS NO SUPERIOR; that NO OTHER POLITICAL SOCIETY [or societies] MAY AUTHORITATIVELY CONTROL ITS LEGISLATION, OR JUDGE OF THE EXTENT TO WHICH THAT LEGISLATION MAY BE CARRIED;' that, 'on the other hand, in respect to all these particulars which truly constitute A NATION, each STATE must be described in terms the exact opposites of those employed in reference to the United States; each STATE is NOT AN INDEPENDENT POLITICAL SOCIETY; it DOES NOT POSSESS IN ITSELF INHERENT AND ABSOLUTE POWERS OF LEGISLATION; ANOTHER POLITICAL SOCIETY not only may but must control its legislation and judge of the extent to which that legislation may be carried; instead of enjoying attributes of sovereignty, EACH STATE, AS A SEPARATE POLITICAL SOCIETY, IS IN A POSITION OF PERMANENT SUBORDINATION.'[1] The theory of this writer is, that the several STATES composing the United States, are the CREATURES of THE ONE BODY POLITIC COMPOSED OF THE WHOLE PEOPLE of the United States, and that the powers which they severally possess, are delegated to them by that one body politic. The FEDERAL theory is, exactly the reverse, that the United States, as a political union, power or government, is the creature of the states, and has no powers but such as the states have delegated to it.

First, then, let us give our attention to the IMPERIAL theory, the grounds of which were formerly stated.[2]

§ 108. Its method and object.

This theory, which demands as its only possibility and support, that the truth of the records of our sovereign legislation be boldly contradicted and denied, or that the

Republicans of our day, whose policy and sentiments are again re-echoed from across the Atlantic in the very able work of a German cousin, which has just been translated and republished under the title of 'The Constitutional and Political History of the United States, by Dr. H. Von Holst, Professor at the University of Freiburg.'

[1] Pomeroy's Constitutional Law, §§ 42 *a*, 43.

[2] *Ante*, § 12, pp. 8–10.

records themselves be kept out of view, has of late been supposed to be absolutely necessary, in order to avoid the conclusions of certain extreme advocates of the state-rights theory.[1] The fact that the colonies became, by a successful attempt at political revolution, sovereign, free and independent states, must therefore be denied, whether it be true or be false. Thus Mr. Pomeroy:—'There never was, in fact, a moment's interval, when the several states were each independent and sovereign.' 'Grant,' says he, 'that in the beginning, the several states were, in any true sense, independent sovereignties, and I see no escape from the extreme positions reached by Mr. Calhoun.'[2] It must logically follow in his view (I suppose), that, in duty to ourselves and to each other, we ought to explicitly deny that fact; deny, also, that the ordinances of ratification,—required by the very last article of the federal constitution as the only conditions upon which it could ever become the organic law of the Union,—were the acts of sovereign bodies! affirm and pronounce, in consequence, that that constitution itself is a mockery and a fraud, of no obligation—null and void *per se*, without any act of nullification—because we see no other way to escape the extreme positions reached by 'the impracticable intellect of Mr. Calhoun.'

It is far from clear, however, that we are driven to accept, either the argument of Mr. Calhoun, or the imperial theory. To the former, it is a sufficient answer, that it strikes no less at the government of a state, than at the government of a union of states: that it equally subverts all governments alike so far as they are founded in COMMON CONSENT.[1] To the latter, we need only to say, that the very condition of its possibility, the open denial of what we know to be true, is treason to the highest obligation of our nature.

§ 104. Parties to the constitution.

It is conceded by all, that our governments are founded

[1] See § 18 (pp. 10, 11) *ante*, where the *grounds* of the state-rights theory are presented.

[2] Pomeroy's Constitutional Law, §§ 54, 55.

in WRITTEN CONSTITUTIONS; and that these constitutions are founded in COMMON CONSENT. Call them by whatever *name* we may please,—constitutions, organic laws, sovereign compacts, ordinances, statutes, treaties or leagues,—the *fact* that they rest in the COMMON CONSENT of those who made them, cannot be denied. Now in order to this common consent, there must have been PARTIES, COMPETENT TO CONSENT. Their *competency* must also have been determined, established and made known, by some LAW, previously prescribed. In relation, then, to the FEDERAL CONSTITUTION, the inquiry must be, first, WHO WERE THE ORIGINAL PARTIES THERETO; secondly, BY WHAT LAW WAS THEIR CONPETENCY ESTABLISHED AND MADE KNOWN?

First, then, WHO WERE THE ORIGINAL PARTIES TO THE FEDERAL CONSTITUTION? In answer to this question, one or other of two grounds must be taken; either, that these parties were co-equal and co-independent political societies or states, sovereign members of the great commonwealth of nations, and, as such, antecedently bound by no laws but the laws of that commonwealth; or else, that these parties were co-equal and co-independent *individual* electors or voters, sovereign members of some political society or state, and, as such, antecedently bound by no laws but the laws of that state. Which of these grounds is the true one? Let HISTORY answer. 'We have now to deal with plain historical facts, not with theories, nor with disputed questions of intention. Whatever these facts may be, we cannot change them by argument, nor escape from their legitimate consequences. I repeat, the condition and character of the political society'—of the ONE SOVEREIGN BODY POLITIC composed of the WHOLE PEOPLE of this country—'prior to, and at the time of, the adoption of the Constitution, is a fact, to be ascertained in the same manner as any other matter within the province of history.'[1] But HISTORY says not a word of THE EMPIRE, not a word of the the United STATE of America.

[1] Pomeroy's Constitutional Law, § 46.

§ 105. Competency of those parties — how determined.

Secondly, then, by what LAW was the COMPETENCY of the parties to the federal constitution established and made known? *If* these parties were co-equal members of some single political society or state, some ONE SELF-EXISTING AND SOVEREIGN POLITICAL BODY, 'prior to, and at the time of, the adoption of the Constitution,' there must have been some LAW of that political body, by which their COMPETENCY AS ELECTORS was determined and prescribed. I say, AS ELECTORS; that is, as members qualified by law to vote, to give their consent, as the original and co-equal sovereigns composing the body politic. This body politic, this ONE undivided and indivisible empire, composed of the people of the whole of this country, must have had laws? There must have been a *legislative* power, and that must have prescribed laws, and so have determined *who* were *competent* to become parties to the new constitution. Where are those LAWS? Where are the RECORDS of this empire? Let HISTORY answer! That empire, and those laws, must have existed both 'prior to, and at the time of, the adoption of the Constitution,' prior, indeed, to any action by the people as separate and independent bodies of electors composing the separate and independent states; and consequently prior to the election of the delegates to the congresses preceding and during the Revolution. For these delegates, as we have seen, were the chosen representatives, not of any one single political body, but of those very organizations or bodies of electors, which, from their several conditions as colonies, emerged into sovereign and independent states. The records of the COLONIES, the records of the STATES, and the records of the UNITED STATES—all these we have. But where are the records of *'the political unit that lies behind'*? Where is the history of the *empire?* If this 'political unit' cannot be identified as a *historical fact*,—if its *records* and *laws* cannot be found, there is, confessedly, an end of the *imperial* theory; and we are driven to accept that theory which is inseparably interwoven with the history of our political existence, and which from the first to the last has re-

garded our UNION as a UNION OF STATES and not as a union of individuals.

§ 106. Advantages of the imperial theory.

But before we dismiss the imperial theory, perhaps we ought to consider what advantages it proposes: for, without doubt, it is possible yet for the people of the states to establish the empire—to wholly resume the powers of their governments, state and federal, and new-model and re-vest them as they please. This, indeed, may easily be done by a simple amendment to the federal constitution, carried in three-fourths of the state legislatures by a mere party vote (?)! First, then, it is claimed as a peculiar advantage of this theory, that it forever puts an end to the right of the people of a state to resume to themselves the powers they have delegated to their governments; and this it does by simply *denying* that when, in their judgment, those powers have been perverted into engines of tyranny and oppression, or 'when,' in the words of the Declaration of Independence, 'a long train of abuses and usurpations, pursuing invariably the same object, evinces a design to reduce them under absolute despotism, it is their right, it is their duty, to throw off such government, and to provide new guards for their future security:' by simply *denying* their right of *self-government*, their sovereignty, as a state, and affirming that they are, as a political society, in a position of permanent subordination to another political society, antecedently self-existing, with its own organization and government, and possessing in and for itself, inherent and absolute powers of legislation. This *other political society* is called '*the nation*.' The states are viewed as *creatures* of 'the nation,' and as having no powers to resume but such as 'the nation' has delegated to them. 'The organic law of the nation binds them by an irresistible sanction; another political society'—(a political society other than any state, and other than any political union of the states as such, namely, 'the nation,')—'not only may, but must control their legislation, and judge of the extent to which that legislation may be carried.'[1] 'NAY, IT IS POS-

[1] Pomeroy's Constitutional Law, §§ 42 a, 43.

SIBLE THAT THE IDEA OF LOCAL SELF-GOVERNMENT, WHICH UNDERLIES OUR PRESENT CIVIL POLITY, MIGHT BE ENTIRELY ABANDONED, AND THE PLAN OF COMPLETE CONSOLIDATION SUBSTITUTED IN ITS STEAD; EVEN A MONARCHY MIGHT BE REARED IN THE PLACE OF THE PRESENT REPUBLIC.'[1] Another advantage of the theory is, that it views 'the organic law of the nation' as already establishing an IMPERIAL AND UNLIMITED GOVERNMENT—*i. e.*, a government possessing the power to finally, authoritatively, and exclusively judge of the extent of its powers. It finds and fixes no limit to the power, the duty and right of the general government, to execute whatever laws, resolutions or decisions, it may choose to make. The states are the creatures of 'the organic law of the nation,' and not all combined can change it, or any construction thereof, without the consent of the imperial government thereby established. All further trouble about amendments, enlarging the powers of the 'national' government, is thus at once and forever avoided.

Such are the imperial advantages of this imperial scheme![2]

§ 107. A new and easy method of usurpation.

I cannot here but reflect, that there are principally only two ways by which a people originally free, and inspired by the inspiring love of freedom, may come to lose their liberties, and to be themselves the slaves of the enslaving lust of power. The two ways are, first, by an open and forcible subjection of the people to military rule; secondly, by a chain of legislative usurpations upon the organic law, masked as measures and means to the public good. The former is doubtless the more ancient and honorable way.

[1] Pomeroy's Const. Law, § 115.

[2] The fundamental principle of the imperial theory, especially that of Mr. Pomeroy, appears to be *self-contradiction*. 'The people of the United States, *is one body politic, possessing inherent sovereignty*.' This Mr. Pomeroy asserts on almost every page of his introduction to the constitution. He also asserts that 'The whole scheme of the national government implies the existence of some organized *states*, and *the sole action of these states in constructing and carrying on the government*. Thus congress is composed of representatives and senators from the *states*; the President and Vice President are chosen by electors appointed by the *states*.' (Pomeroy's Const. Law, § 498.) This fundamental contradiction being given, a system of contradictions results.

But then the latter must have this advantage, that it will always prove the less dangerous and difficult, and generally also the more certain of its object; requiring at first no open employment of force; being easily concealed under specious pretensions to the public weal, so as to be nowhere observed; unless in the pretexts of power for assuming greater power—for restraining the liberty of speech and assuming control of the press; for gradually increasing the government force, and largely distributing the public purse; by the former of which means, the masses of the people (who too seldom think for themselves) are easily educated to the new idea (whatever that may be), while by the latter a loyal and zealous support is at once obtained from such as are willing to barter their liberties for the favors of a prince.

§ 108. The preamble to the constitution.

As an instance and apt illustration of the grounds on which the imperial theory is placed, we again refer to the language of the preamble to the federal constitution; '*We, the people of the United States*, . . . . do ordain and establish this constitution *for* the United *States* of America.'

'Here,' says Mr. Pomeroy, 'is the calm, sublime statement of *self-existence*, of *inherent and unlimited power*,—a power of national and fundamental legislation for the purposes of protection to *themselves as* A BODY POLITIC, and not to the states as separate political societies. This is the rock upon which many of the great champions of nationality among American statesmen have planted themselves in their conflicts with opposing schools, and from which they were never dislodged by the fiercest assaults of extreme or moderate partisans of state sovereignty.'[1]

§ 109. How it originally stood, and why changed.

It is difficult to believe that the learned 'professor of political science in the University of New York,' who proposed 'to deal with plain historical facts, not with theories, nor with disputed questions of intention,' was really ignorant of the history of this 'rock.' Every one knows, or

[1] Pomeroy's Const. Law, § 94.

ought to know, that, as originally penned and unanimously passed by the convention that framed it, the preamble read—'We, the people of the States of New Hampshire, Massachusetts, Rhode Island and Providence Plantations, Connecticut, New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina, and Georgia, do ordain, declare and establish, the following Constitution, for the government of ourselves and our posterity.'[1] The change of this expression of the organic will, to that of 'We, the people of the United States,' etc., was proposed by a sub-committee on *style*. And wherefore? Because, it could not be foreknown, which of the STATES would accept and ratify the new constitution. If any *nine* of them should do so, they, at all events, *according to the last article of the instrument*, would thence become the *United States* of America. Hence the committee on style revised the language of the convention, and substituted 'the *United States*,' in place of 'the States of New Hampshire, Massachusetts, Rhode Island,' etc.[2]

§ 110. Mr. Curtis's explanation.

This is explained by Mr. Curtis, in his History of the Constitution.[3]

[1] Elliot's Debates, Vol. I, 230–231.

[2] It may be asked, why was the word 'people' employed? The following extract (among many others that might be given) from The Federalist, will answer this question. 'It has not a little contributed to the infirmities of the existing federal system, that it never had a ratification by the PEOPLE. Resting on no better foundation than the consent of the several *legislatures*, it has been exposed to frequent and intricate questions concerning the validity of its powers; and has, in some instances, given birth to the enormous doctrine of a right of *legislative repeal*. Owing its ratification to the law of a state, it has been contended that the same authority might repeal the law by which it was ratified. However gross a heresy it may be to maintain that a *party* to a *compact* has a right to revoke that *compact*, the doctrine itself has had respectable advocates. The possibility of a question of this nature, proves the necessity of laying the foundations of our national government deeper than in *the mere sanction of delegated authority*. The fabric of American empire ought to rest on the solid basis of THE CONSENT OF THE PEOPLE. The streams of national power ought to flow immediately from that pure original fountain of all legitimate authority.' The Federalist, No. 22, p. 108.—Hamilton.

[3] Vol. II, b. 4, c. 8, pp. 181–182.

'The States, in their corporate capacities, and through the agency of their respective Governments, were parties to a Federal system, which they had stipulated with each other, should be changed only by a unanimous consent. The Constitution, which was now in the process of formation, was a system, designed for the acceptance of the people of all the States, if the assent of all could be obtained; but it was also designed for the acceptance of a less number, than the whole of the States, in case of a refusal of some of them; and it was at this time highly probable that at least two of them would not adopt it. Rhode Island had never been represented in the Convention; and the whole course of her past history, with reference to enlargements of the powers of the Union, made it quite improbable that she would ratify such a plan of Government as was now to be presented to her. The State of New York had, through her Delegates, taken part in the proceedings, until the final decision which introduced into the Government a system of popular representation; but two of those Delegates, entirely dissatisfied with that decision, had withdrawn from the Convention, and had gone home to prepare the State for the rejection of the scheme. The previous conduct of the State had made it not at all unlikely that their efforts would be successful. Nor were there wanting other indications of the most serious dissatisfaction, on the part of men of great influence in some of the other States. Unanimity had already become hopeless, if not impracticable; and it was necessary, therefore, to look forward to the event of an adoption of the system by a less number than the whole of the States, and to make it practicable for a less number to form the new Union for which it provided. This could only be done by presenting it, for ratification, to the people of each State, who possessed authority to withdraw the State Government from the Confederation, and to enter into new relations with the people of such other States as might, also, withdraw from the old, and accept the new system.' So much for the Gibraltar of the imperial theory.[1]

[1] 'In the most recent times,' says Mr. Pomeroy, 'this theory has been

## THE FEDERAL THEORY.

§ 111. Federal theory — views of the framers of the constitution.

It was formerly shown, that the only possibility of a developed with great precision and fullness by writers and juridical students of eminent ability and learning. Among these may be mentioned John Codman Hurd, in his "Essay on the Law of Freedom and Bondage in the United States;" O. A. Brownson, in his "American Republic," and George P. Marsh, in a series of letters communicated to the "Nation." With all deference to these able and learned writers, and to some others who have followed in their train, I must beg leave to say, that they have failed to develop the imperial theory in so perfect a manner as Mr. Pomeroy himself has done.

The seeds of the imperial theory, were, without doubt, originally sown by some of the *Nationals* (after the defeat of their scheme in the convention that framed the federal constitution) by way of attempting a *construction* of that instrument which should favor the sovereignty of the general government. One of the earliest of the efforts made toward such a construction, after the adoption of the constitution, was that of John Jay, when, in 1793, as the first chief justice of the United States, he delivered his opinion in the important case of Chisholm Ex'r *v.* Georgia (reported in 2 Dall. 470, *et seq*). One or two paragraphs of that opinion, will show the method and grounds of argument originally taken. He therein says:—'In determining the sense in which Georgia is a sovereign State, it may be useful to turn our attention to the political situation we were in, prior to the Revolution, and to the political rights which emerged from the Revolution. All the country now possessed by the United States, was then a part of the dominions appertaining to the crown of Great Britain. Every acre of land in this country was then held mediately or immediately by grants from that crown. All the people of this country were then subjects of the King of Great Britain, and owed allegiance to him; and all the civil authority then existing or exercised here, flowed from the head of the British Empire. They were in the strict sense fellow subjects, and in a variety of respects one people.' . . . . . 'The Revolution, or rather the Declaration of Independence, found the people already united for general purposes, and at the same time providing for their more domestic concerns by State conventions and other temporary arrangements. From the crown of Great Britain, the sovereignty of the country passed to the people of it; and it was then not an uncommon opinion, that the unappropriated lands which belonged to that crown, passed not to the people of the Colony or State within whose limits they were situated, but to the whole people; on whatever principle this opinion rested, it did not give way to the other, and [although] thirteen sovereignties were considered as emerged from the principles of the Revolotion, combined with local convenience and considerations, the people nevertheless continued to consider themselves, in a national point of view, as one people; and

UNION OF STATES as such, is the possibility of an organic law of their union, which shall determine and fix the

they continued without interruption to manage their national concerns accordingly: afterwards in the hurry of the war, they made a Confederation of the States the basis of a General Government. Experience disappointed the expectations they had formed from it; and then the people in their collective and national capacity, established the present Constitution. It is remarkable that in establishing it, the people exercised their own rights, and their own proper sovereignty, and conscious of the plentitude of it, they declared, with becoming dignity, "We, the people of the United States, do ordain and establish this Constitution." Here we see the people acting as sovereigns of the whole country; and in the language of sovereignty, establishing a Constitution by which it was their will, that the State Governments should be bound, and to which the State Constitutions should be made to conform. . . . . By this great Compact, however, many prerogatives were transfered to the National Government, such as those of making war and peace, contracting alliances, coining money, etc. . . . . At the Revolution, the sovereignty devolved on the people; and they are truly the sovereigns of the country, but they are sovereigns without subjects (unless the African slaves among us may be so called) and have none to govern but themselves; the citizens of America are equal as fellow citizens, and joint tenants in the sovereignty.'

The *foundation* of the theory in question, then, is the *assertion* of *three* things as *facts*; *viz*:

1. That the Anglo-American people were originally British subjects, and as such, were a portion of one and the same political society, nation or state, namely, that of Great Britain; which political society, however, so far as it concerned the American portion thereof, was dissolved and ended by the American Revolution.

2. That the Revolution was accomplished in pursuance of authority delegated by the American portion of that political society, *this American portion acting in the character and capacity of a single new political state;* and thereupon the *sovereignty* of the country passed, from the crown of Great Britain, to this new political society, to the *American people in their new capacity of a single political body.*

3. That the constitution of the United States was ordained and established by 'the people of the United States,' the people acting as coequal members of *a single political community*, that is to say, *as the single new political state*, which had from the beginning assumed the sovereignty of the country.

Now the first proposition is true to the letter. But the second and third are mere inventions, idle fictions; which, however 'played off with the ingenious dexterity of political legerdemain,' are wholly at variance with the facts of our history, as everyone knows or ought to know; but which, nevertheless, must be either *ignorantly or perversely asserted as true* by every advocate of this scheme of absolute government in America.

natural and necessary boundary line between the internal sovereignty of each and the external sovereignty of all.[1]

The original proponents of the theory, as will be evident to all who carefully examine the occasions which called it forth, designed it as merely responsive to the equally unfounded and preposterous assertions of sovereignty in the *governments* of the states. Thus in the case above mentioned, the ground was taken that the *government* of Georgia was sovereign; and it was in opposition to that doctrine that the foregoing theory was advanced. The theory, however, was subsequently adopted by Justice Story, as also by others, and perhaps with a similar object in view. While the later proponents and advocates of the scheme, among them the leaders of the republican party during the late rebellion, have given to it the character and developed form of a theory which, in proportion as followed, tends to convert our general government into an *imperial, unlimited, irreponsible and despotic power.* Apart from the fact alone that it is now *enforced*, not by appeals to the *records* of our sovereign legislation, but by the *power* of the dominant party, it has, as we have clearly and abundantly shown, no sort of foundation which could for a moment entitle it to a serious consideration. A single fact of our history completely explodes it; that, *from the beginning of the Revolution down to the present day, the people of* EACH STATE, *in every delegation of power to the state or the United States government, have acted as a separate and sovereign political community, have voted by virtue of their own inherent authority expressed in their own peculiar election law.* No one, indeed, has ever asserted that the people of each state ever once acted by virtue of an election law which was common to all the states and imposed or prescribed by a common authority. And this, *the authority for the election laws*, is the highest test of *sovereignty* known to our system.

'But it is not to be forgotten that these doctrines, though ever so clearly disproved, or ever so weakly defended, remain before the public a striking monument of the principles and views which are entertained and propagated in the community. It is also to be remembered, that however the consequences flowing from such premises, may be disavowed at this time, or by this individual, we are to regard it as morally certain, that in proportion as the doctrines make their way into the creed of the government, and the acquiescence of the public, every power that can be deduced from them, will be deduced, and exercised sooner or later by those who may have an interest in so doing. The character of human nature gives this salutary warning to every sober and reflecting mind. And the history of government in all its forms and in every period of time, ratifies the danger. *A people, therefore, who are so happy as to possess the inestimable blessing of a free and defined constitution, cannot be too watchful against the introduction, nor too critical in tracing the consequences, of new principles and new constructions, that may remove the landmarks of power.*' Letters of Helvidius, No. 4. Madison.

[1] See §§ 14, 15, 16, *ante.*

If, then, a UNION OF STATES was designed by the federal constitution, there ought to be some evidence of an effort to fix this boundary line, not only in the nature and character of the several provisions of the federal constitution, but also in the proceedings of those who framed and established that organic law.

From the speeches of one who was distinguished as a leader, not only in the general convention of the states, but afterwards also in the ratifying convention of Pennsylvania, we have the following account of the difficulties experienced by the framers of 'the new constitution.'[1] 'A very important difficulty arose from comparing the extent of the country to be governed, with the kind of government which it would be proper to establish in it. It has been an opinion, countenanced by high authority, "that the natural property of small states is to be governed as a republic; of middling ones, to be subject to a monarchy; and of large empires, to be swayed by a despotic prince;—and that the consequence is, that in order to preserve the principles of the established government, the state must be supported in the extent it has acquired; and that the spirit of the state will alter in proportion as it extends or contracts its limits."[2] This opinion seems to be supported, rather than contradicted, by the history of the governments in the old world. Here, then, the difficulty appeared in full view. On the one hand, the United States contain an immense extent of territory; and, according to the foregoing opinion, a despotic government is best adapted to that extent. On the other hand, it was well known, that however the citizens of the United States might with pleasure submit to the legitimate restraints of a republican constitution, they would reject with indignation the fetters of despotism. What, then, was to be done? The idea of a CONFEDERATE REPUBLIC presented itself. This kind of constitution has been thought to have "all the internal advantages of a republican, together with the external force of a mon-

[1] See Wilson's speeches in the Pennsylvania Convention, reported in Elliot's Debates, Vol. II, p. 418.

[2] Montesquieu, Spirit of Laws, b. VIII, c. 20.

archical government."[1] Its description is, "a convention by which several smaller states agree to become members of a larger one, which they intend to establish. It is a kind of assemblage of societies that constitute a new one, capable of increasing by means of further association."[2] The expanding quality of such government is peculiarly fitted for the United States, the great part of whose territory is yet uncultivated.' * * * *

§ 112. The principle that governed the convention.

'The convention, by proposing to their constituents the plan of a CONFEDERATED REPUBLIC, found themselves embarrassed with another difficulty, of peculiar delicacy and importance. I mean that of drawing *a proper line* between the national government and the governments of the several States.[3] It was easy to discover a proper and satisfactory *principle* on the subject. Whatever object of government is confined in its operation and effects, within the bounds of a particular state, should be considered as belonging to the government of that state; whatever object of government extends, in its operation or effects, beyond the bounds of a particular state, should be considered as belonging to the government of the United States. But though this principle be sound and satisfactory, its application to particular cases would be accompanied with much difficulty, because, in its application, room must be allowed for great discretionary latitude of construction of the principle. In order to lessen or remove the difficulty, arising from discretionary construction on this subject, an *enumeration* of particular instances, in which the application of the principle ought to take place, has been attempted with much industry and care. It is only in mathe-

[1] Montesquieu, b. IX., c. 1, 2; Paley, 199, 202.

[2] Montesquieu, b. IX., c. 1.

[3] 'The arduous task of marking the proper line of partition between the authority of the general, and that of the state governments,' and the difficulties experienced in relation thereto, were commented on by Madison, and very fully illustrated by examples, in a number contributed by him to The Federalist. See, of that work, No. 37, pp. 163, 164, 165. See also the letter of the convention submitting the constitution to the then congress, *ante*, § 83 *a*.

matical science that a line can be described with mathematical precision. But I flatter myself, that, upon the strictest investigation, the *enumeration* will be found to be safe, and unexceptionable, and accurate, too, in as great a degree as accuracy can be expected in a subject of this nature.' . . . . 'After all, it will be necessary that, on a subject so peculiarly delicate as this, much prudence, much candor, much moderation and much liberality, should be exercised and displayed, both by the Federal government and by the governments of the several States. It is to be hoped that those virtues of government will be exercised and displayed, when we consider that the powers of the Federal government, and those of the State governments, are drawn from sources equally pure.'

§ 118. Design of the federal constitution.

The truth then is, that the framers of the present constitution of the union designed to establish a UNION OF STATES; a 'CONFEDERATED REPUBLIC,' 'a convention by which several smaller states agree to become members of a larger one;' —and in order to accomplish this, designed to determine and fix the *line* between the *sovereignty of each state*, as a free and independent political community, and the *sovereignty of all*, as united in a general government for all; and to fix this line, in the only practicable way in which it could be fixed, by 'an *enumeration* of the particular instances in which the application of the principle ought to take place;' in other words, by an *enumeration of the specific powers* to be vested in the common government: a step which had never been taken in framing the state constitutions.

For this position, we also have the contemporaneous and unquestionable authority of 'The Federalist.'[1] The oppon-

[1] A series of very extraordinary papers 'ON THE NEW CONSTITUTION,' written during the pendency of that instrument before 'the people' for ratification or rejection by Alexander Hamilton, James Madison, and John Jay, and which every student of our political system should carefully and constantly study.

'There is no work on the subject of the constitution, and on republican and federal government generally, that deserves to be more thoroughly studied. The Federalist appeared originally in a series of numbers,

ents of the new constitution had urged the objection, that in departing from the peculiar characteristic of the old confederation, which was that of a government ACTING UPON STATES and NOT UPON INDIVIDUALS, the original idea of a federal government had been abandoned. But that, it was shown, was no criterion of a federal, as distinguished from a national, government. The true criterion of a *federal* government was shown to be, A UNION OF TWO OR MORE STATES as such.[1] It will, however, be important to observe, that the opponents of the new constitution, were answered in accordance with *their* criterion of a federal government. Thus Mr. Madison:—'In order to ascertain the real character of the government, it may be considered in relation to the *foundation* on which it is to be established; to the

published in the New York daily papers, between October, 1787, and June, 1788. They were read with admiration and enthusiasm as they successively appeared. * * * * No constitution of government ever received a more masterly and successful vindication. I know not, indeed, of any work on the principles of free government that is to be compared, in instruction and instrinsic value, to this small and unpretending volume of 'The Federalist,' not even if we resort to Aristotle, Cicero, Machiavel, Montesquieu, Milton, Locke, or Burke. It is equally admirable in the depth of its wisdom, the comprehensiveness of its views, the sagacity of its reflections, and the fearlessness, patriotism, candor, simplicity and elegance with which its truths are uttered and recommended. Mr. Justice Story acted wisely in making the Federalist the basis of his Commentary.' 1 Kent's Commentaries, *241 in note. 'A series of letters' says Pomeroy, 'since known as The Federalist, which exerted a most powerful influence in producing the final result, and which have been, and will remain, an authority to the courts, and a text-book to political students, one of the most complete and profound expositions of the science of government that has ever appeared.' Pomeroy's Constitutional Law, § 83, p. 58. 'The opinion of The Federalist,' says the Supreme Court of the United States, 'has always been considered as of great authority. It is a complete commentary on our constitution; and is appealed to by all parties in the questions to which that instrument has given birth. Its intrinsic merit entitles it to this high rank; and the part two of its authors performed in framing the constitution, put it very much in their power to explain the views with which it was framed.' Cohens *v.* Virginia, 5 Pet. Cond. R. 122. Let us therefore try by the test of 'The Federalist,' *the only universally acknowledged authority*, all the theories of our system alike, which have been or may be proposed.

[1] See The Federalist, No. 9, pp. 40, 41.

*sources* from which its ordinary powers are to be drawn; to the *operation* of those powers; to the *extent* of them; and to the *authority* by which future changes in the government are to be introduced.

§ 114. *Foundation of the constitution.*

'On examining the first relation, it appears, on the one hand, that the constitution is to be *founded* on the *assent and ratification* of the *people* of America, given by deputies elected for the special purpose; but on the other, that this assent and ratification is to be given by the people, *not as individuals composing one entire nation*, but *as composing the distinct and independent states* to which they respectively belong. It is to be *the assent and ratification of the several states, derived from the supreme authority in each state*—the authority of the *people* themselves. The *act*, therefore, establishing the constitution, will not be a *national*, but a *federal* act.

'That it will be a federal, and not a national act, as these terms are understood by the objectors, the act of the people, as forming so many independent states, not as forming one aggregate nation, is obvious from this single consideration, that it is to result neither from the decision of a *majority* of the people of the union, nor from that of a *majority* of the states. It must result from the *unanimous* assent of the several *states* that are *parties* to it, differing no otherwise from their ordinary assent than in its being expressed, not by the legislative authority, but by that of the people themselves. Were the people regarded in this transaction as forming *one nation*, the will of the *majority* of the whole people of the United States would bind the minority, in the same manner as the majority in each state must bind the minority; and the will of the majority must be determined either by a comparison of the individual votes, or by considering the will of the majority of the states, as evidence of the will of a majority of the people of the United States. Neither of these rules has been adopted. *Each state, in ratifying the constitution, is considered as a sovereign body, independent of all others, and only to be bound by its own voluntary act.* In this relation,

then, the new constitution will, if established, be a *federal*, and not a *national* constitution.'[1]

§ 115. Sources of powers.

'The next relation is, to the *sources* from which the ordinary powers of government are to be derived. The *house of representatives* will derive its powers from the *people* of America, and the people will be represented in the same proportion, and on the same principle, as they are in the legislature of a particular state. So far the government is *national*, not *federal*. The *senate*, on the other hand, will derive its powers from *the states*, as political and co-equal societies; and these (the states) will be represented on the principle of equality in the senate, as they now are in the existing congress. So far, the government is *federal, not national*. The *executive* power will be derived from a very compound source. . . . . From this aspect of the government, it appears to be of a mixed character, presenting at least as many *federal* as national features.'[2]

§ 116. Operation of federal powers.

'The difference between a *federal* and *national* government, as it relates to the *operation* of the government, is, by the adversaries of the plan of the convention, supposed to consist in this, that in the former, the powers operate *on the political bodies composing the confederacy in their political capacities;* in the latter, *on the individual citizens* composing the nation, in their *individual* capacities. On trying the constitution by this criterion, it falls under the *national*, not the *federal* character; though perhaps not so completely as has been understood.'[3]

§ 117. Extent of powers. Line between *state* and *federal* sovereignty.

'But if the government be *national* with regard to the *operation* of its powers, it changes its aspect again when we contemplate it in relation to the *extent* of its powers. The idea of a *national* government involves in it, not only

[1] The Federalist, No. 39, pp. 176, 177.

[2] Id. p. 177. That is, when tried by the criterion of the old confederation.

[3] Id. p. 177.

an authority over the individual citizens, but an indefinite supremacy over all persons and things, so far as they are objects of lawful government. Among a people consolidated into one nation, this supremacy is completely vested in the national legislature. Among communities united for particular purposes, it is vested partly in the general, and partly in the municipal legislatures. In the former case, all local authorities are subordinate to the supreme; and may be controlled, directed, or abolished by it at pleasure. In the latter, the *local* or municipal authorities form *distinct and independent portions* of the supremacy, *no more subject, within their respective spheres, to the general authority, than the general authority is subject to them within its own sphere.* In this relation, then, the proposed government cannot be deemed a *national one; since its jurisdiction extends to certain enumerated objects only, and leaves to the several states a residuary and inviolable sovereignty over all other objects.*[1] . . . .

'Will it be said that the *fundamental principles* of the confederation were not within the purview of the convention, and ought not to have been varied? I ask what are these principles? Do they require, that in the establishment of the constitution, the *states* should be regarded as *distinct and independent sovereigns? They are so regarded by the constitution proposed.* Do they require, that the members of the government should derive their appointment from the legislatures, not from the people of the states? One branch of the new government is to be appointed by these legislatures; and under the confederation, the delegates to congress *may all* be appointed immediately by the people; and in two states are actually so appointed. Do they require, that the powers of the government should act on the states, and not immediately on individuals? In some instances, as has been shown, the powers of the new government will act on the states in their collective characters. In some instances also, those of the existing government act immediately on individuals. . . . Do these principles, in fine, require that the powers of the

[1] The Federalist, No. 39, p. 178.

general government should be limited, and that beyond this limit, the states should be left in possession of their sovereignty and independence? We have seen, that *in the new government*, as in the *old, the general powers are limited; and that the states, in all unenumerated cases, are left in the enjoyment of their sovereign and independent jurisdiction.*

'Truth is, that the great principles of the constitution proposed by the convention, may be considered less, as absolutely new, than as the expansion of principles which are found in the articles of confederation.[1]

'If the new constitution be examined with accuracy and candor, it will be found that the change which it proposes, consists much less in the ADDITION OF NEW POWERS to the union, than in the INVIGORATION of its ORIGINAL POWERS.'[2]

§ 118. The views of Hamilton.

Defending the plan of government proposed by 'the new constitution,' against the arguments drawn from the examples of ancient republics, Alexander Hamilton gave his theory of the new constitutional plan of government, and the principal improvements in political science on which he relied. (His reasoning was always that of a giant mind and master builder, and no apology is therefore needed for quoting from The Federalist his views at considerable length.)

'From the disorders that disfigure the annals of those republics, the advocates of despotism have drawn arguments, not only against the forms of republican government, but against the very principles of civil liberty. . . . . . If it had been found impracticable to have devised models of a more perfect structure, the enlightened friends of liberty would have been obliged to abandon the cause of that species of government as indefensible. The science of politics, however, like most other sciences, has received great improvement. The efficacy of various principles is now well understood, which were either not known at all, or imperfectly known to the ancients. The

[1] The Federalist, No. 40, pp. 181, 182.
[2] Id. No. 45, p. 216.

regular distribution of power into distinct departments; the introduction of legislative balances and checks; the institution of courts composed of judges holding their offices during good behavior; the representation of the people in the legislature by deputies of their own election; these are either wholly new discoveries, or have made their principal progress toward perfection in modern times. . . . . To this catalogue of circumstances, that tend to the melioration of popular systems of civil government, I shall venture, however novel it may appear to some, to add one more, on a principle that has been made the foundation of an objection to the *new* constitution; I mean the ENLARGEMENT of the ORBIT within which such systems are to revolve, either in respect to the dimensions of *a single state*, or to the consolidation of several smaller states, into *one great confederacy.*' [I pause here for a moment to observe, that Hamilton must have had in view, and have well understood the *possibility* of such a *confederacy*, to which our attention was directed in the beginning of this work; and also to observe the sense in which the term *consolidation* was used by the framers of the constitution:] '*The consolidation of several smaller* STATES *into one great* CONFEDERACY. *The latter is that which immediately concerns the object under consideration.* It will, however, be of use to examine the principle in its application to *a single state*, which shall be attended to in another place.

'The utility of a *confederacy*, as well to suppress faction, and to guard *the internal tranquillity of states*, as to increase their external force and security, is in reality not a new idea. It has been practised upon in different countries and ages, and has received the sanction of the most approved writers on the subject of politics. The opponents of the PLAN proposed, have, with great assiduity, cited and circulated the observations of Montesquieu on the necessity of a contracted territory for a republican government. Bnt they seem not to have been apprised of the sentiments of that great man expressed in another part of his work, nor to have adverted to the consequences of the

principle to which they subscribe with such ready acquiescence. . . . . .

§ 119. A confederate republic proposed.

'Referring the examination of the principle itself to another place, as has been already mentioned, it will be sufficient to remark here, that in the sense of the author who has been most emphatically quoted on the occasion, it would only dictate a reduction of the SIZE of the more considerable MEMBERS of the union; but would not militate against their all being comprehended in ONE CONFEDERATE GOVERNMENT. And *this is the true question, in the discussion of which we are at present interested.*

'"It is very probable," says he,[1] "that mankind would have been obliged, at length, to live constantly under the government of a SINGLE PERSON, had they not contrived a kind of constitution, that has all the internal advantages of a republican, together with the external force of a monarchical government. I mean a CONFEDERATE REPUBLIC.

'"This form of government is a convention by which several smaller *states* agree to become members of a *larger* one, which they intend to form. It is a kind of assemblage of societies, that constitute a new one, capable of increasing by means of new associations, till they arrive to such a degree of power as to be able to provide for the security of the united body.

'"A republic of this kind, able to withstand an external force, may support itself without any internal corruption. The form of this society prevents all manner of inconveniences.

'"If a single member should attempt to usurp the supreme authority, he could not be supposed to have an equal authority and credit in all the confederate states. Were he to have too great influence over one, this would alarm the rest. Were he to subdue a part, that which would still remain free might oppose him with forces independent of those which he had usurped, and overpower him before he could be settled in his usurpation.

'"Should a popular insurrection happen in one of the

[1] Spirit of Laws, Vol. I, b. IX, c. I.

confederate states, the others are able to quell it. Should abuses creep into one part, these are reformed by those that remain sound. The state may be destroyed on one side, and not on the other; *the confederacy may be dissolved, the confederates preserve their sovereignty.*

'"As this government is composed of small republics, it enjoys the internal happiness of each, and with respect to its external situation, it is possessed, by means of the association, of all the advantages of large monarchies."

'I have thought it proper to quote at length these interesting passages, BECAUSE THEY CONTAIN A LUMINOUS ABRIDGMENT OF THE PRINCIPAL ARGUMENTS IN FAVOR OF THE UNION, and must effectually remove the false impressions which a misapplication of the other parts of the work was calculated to produce.'[1]

I leave the reader to collect what sort of government it was that Hamilton believed was about to be formed by 'the new constitution,' and that he was so anxious the states should adopt.

§ 120. The fact is undeniable, that a CONFEDERACY OF THE STATES, a CONFEDERATE REPUBLIC, after the model given by Montesquieu, was in the minds of all who favored the adoption of the new constitution. The ideas of those who speculated on the dismemberment of the union, as Hamilton himself informs us, seemed generally turned towards *three confederacies;* one consisting of the four nothern, another of the four middle, and a third of the five southern states. And he, opposing to that scheme the advantages of 'one confederate government,' did not scruple to argue that in the event of so many confederacies, '*each would require a government not less comprehensive than the one proposed.*'[2]

Madison said: 'The *immediate object* of the Federal Constitution, is to secure the UNION of the THIRTEEN PRIMITIVE STATES, which we know to be practicable; and to add to THEM such OTHER STATES, as may arise in their own bosoms or in their neighborhoods, which we cannot doubt to be

[1] The Federalist, No. 9.

[2] The Federalist, No. 18, p. 59.

equally practicable.'[1] 'The leaders of the Revolution formed the design of a great CONFEDERACY, which it is incumbent on their successors to improve and perpetuate. If they erred most in the structure of the UNION, this was the work most difficult to be executed; this is the work which has been new modelled by the act of your convention, and it is that act on which you are now to deliberate and to decide.'[2]

§ 121. Advantages of a federal government.

And what, according to Hamilton, was the great advantage to be secured by the federal system? 'In a CONFEDERACY,' he says, 'the people, without exaggeration, may be said to be entirely the masters of their own fate. Power being almost always the rival of power, the general government will at all times stand ready to check the usurpations of the state governments; and these will have the same disposition towards the general government. The people, by throwing themselves into either scale, will infallibly make it preponderate. If their rights are invaded by either, they can make use of the other as the instrument of redress. . . . . It may safely be received as an axiom in our political system, that the state governments will, in all possible contingencies, afford complete security against invasions of the public liberty by the national authority.'[3]

The two opposite ideas of the time, were, on the one hand, that of a league between the states, offensive and defensive, with a general council or congress clothed with powers to act on the states but not on their citizens; and that, on the other hand, of a confederation of the states in a common government for common interests and general purposes, formed on the model of the state governments, and possessed of certain enumerated powers, and acting immediately, within the sphere assigned to it, on the citizens of all the states. The first was favored by the states-right party; the last was the plan proposed by

[1] The Federalist, No. 14, p. 63.
[2] Id. pp. 64–65.
[3] Id. No. 28, p. 126.

the new constitution, and advocated by the authors of 'The Federalist.' The objections of the state-rights advocates, were chiefly directed against a *consolidation* of the states *into one political body;* and the whole reasoning, tenor and spirit of 'The Federalist,' go to show, that to answer those objections, so far as they went to the proposed constitution, was one of the principal designs of that work. It was, as we have said, also in issue, whether there ought to be only a single confederacy of the states, or two or more; and this also entered into some of the discussions.

§ 122. Legislation for States condemned.

The state-rights party particularly objected to the immediate action of the federal government, on the *citizens* of the states. Hamilton answered as follows: 'If we still adhere to the design of a NATIONAL GOVERNMENT, or, which is the same thing, of a SUPERINTENDING POWER, under the direction of a COMMON COUNCIL, we must resolve to incorporate into our plan those ingredients which may be considered as forming the characteristic difference between a LEAGUE and a GOVERNMENT; we must extend the authority of the union to the PERSONS of the citizens—the only proper objects of government.'[1] (Note his definition of a *national government.*) 'The concurrence of THIRTEEN DISTINCT SOVEREIGN WILLS is requisite under the confederation, to the complete execution of every important measure that proceeds from the union. It has happened, as was to have been foreseen. . . . . Congress at this time scarcely possess the means of keeping up the forms of administration, till the states can have time to agree upon a more substantial substitute for *the present shadow of a federal government.* . . . . Each state, yielding to the persuasive voice of immediate interest or convenience, has successively withdrawn its support, till the frail and tottering edifice seems ready to fall on our heads, and to crush us beneath its ruins.[2] The tendency of the principle of legislation for states or communities in their political capacities, as it has been exemplified by the experiment we

[1] The Federalist, No. 15, pp. 68–69.
[2] Id. pp. 70–71.

have made of it, is equally attested by the events which have befallen all other governments of the confederate kind, of which we have any account, in exact proportion to its prevalence in those systems. . . . . Of all the confederacies of antiquity which history has handed down to us, the Lycian and Achæan leagues, as far as there remain vestiges of them, appear to have been most free from the fetters of that mistaken principle, and were accordingly those which have best deserved, and have most liberally received, the applauding suffrages of political writers. This exceptionable principle may, as truly as emphatically, be styled the parent of anarchy; it has been seen, that delinquencies in the members of the union are its natural and necessary offspring; and that whenever they happen, the only constitutional remedy is force, and the immediate effect of the use of it, civil war.'[1]

§ 123. Coercion of states impracticable.

'It seems to require no pains to prove, that the states ought not to prefer a national constitution, which could only be kept in motion by the instrumentality of a large army, continually on foot to execute the ordinary requisitions or decrees of the government. And yet this is the plain alternative involved by those who wish to deny it the power of extending its operations to individuals. Such a scheme, if practicable at all, would instantly degenerate into a military despotism: but it will be found in every light impracticable. . . . Whoever considers the populousness and strength of several of these states singly at the present juncture, and looks forward to what they will become, even at the distance of half a century, will at once dismiss as idle and visionary any scheme, which aims at regulating their movements by laws, to operate upon them in their collective capacities, and to be executed by a coercion applicable to them in the same capacities. A project of this kind is a little less romantic than the monster-taming spirit, attributed to the fabulous heroes and demi-gods of antiquity.

'Even in those confederacies, which have been composed

[1] The Federalist, No. 16, pp. 71–72. See § 18, *ante*.

of members smaller than many of our counties, the principle of legislation for sovereign states, supported by military coercion, has never been found effectual. It has rarely been attempted to be employed, but against the weaker members; and in most instances attempts to coerce the refractory and disobedient, have been the signals of bloody wars, in which one-half of the confederacy has displayed its banners against the other.

'The result of these observations to an intelligent mind, must be clearly this, that if it be possible at any rate to construct a federal government capable of regulating the common concerns, the preserving the general tranquillity, it must be founded, as to the objects committed to its care, upon the reverse of the principle contended for by the opponents of the proposed constitution. It must stand in need of no intermediate legislations; but must itself be empowered to employ the arm of the ordinary magistrate to execute its own resolutions. The majesty of the national authority must be manifested through the medium of the courts of justice. The government of the union, like that of each state, must be able to address itself immediately to the hopes and fears of individuals; and to attract to its support those passions which have the strongest influence upon the human heart. It must, in short, possess all the means, and have a right to resort to all the methods, of executing the powers with which it is intrusted, that are possessed and exercised by the governments of the particular states.'[1] Thus did Hamilton answer the opponents of legislation for individuals by the federal government, while not ceasing for a moment to support the plan of a CONFEDERATE REPUBLIC.

§ 124. Encrochments by the states.

The course pursued by the states, under the articles of confederation, had led him to view their authority with jealousy. He acknowledged his 'aversion to every project that was calculated to disarm the federal government of a single weapon, which in any possible contingency might

[1] The Federalist, pp. 73–74.

be usefully employed for the general defence and security.'[1] 'It will,' he said, '*always be far more easy for the state governments to encroach upon the national authorities, than for the national government to encroach upon the state authorities.*'[2] And why? Because of 'the greater degree of influence which the state governments, if they administer their affairs with uprightness and prudence, will generally possess over the people; a circumstance which at the same time teaches us, that there is an inherent and intrinsic weakness in all federal constitutions; and that too much pains cannot be taken in their organization, to give them all the force which is compatible with the principles of liberty.'[3] To the proof and development of these positions, several numbers of 'The Federalist' were devoted.[4] In No. 25 he says, 'Reasons have been already given to induce a supposition, that the state governments will too naturally be prone to a rivalship with that of the union, the foundation of which will be the love of power; and that in any contest between the federal head and one of its members, the people will be most apt to unite with their local government.' 'The state legislatures will always be not only vigilant, but suspicious and jealous guardians of the rights of the citizens, against encroachments from the federal government; will constantly have their attention awake to the conduct of the national rulers, and will be ready enough, if anything improper appears, to sound the alarm to the people, and not only to be the VOICE, but, if necessary, the ARM of their discontent.'[5] 'The convention probably foresaw, what it has been a principal aim of these papers to inculcate, that the danger which most threatens our political welfare is, that the state governments will finally sap the foundations of the union.'[6] In the very last number of The Federalist, he says, 'We

[1] The Federalist, No. 36, p. 160.
[2] Id. No. 17, p. 76.
[3] Id. pp. 76-77.
[4] See Nos. 18, 19 and 20.
[5] Id. No. 26, p. 119.
[6] Id. No. 33, p. 144.

may safely rely on the disposition of the state legislatures to erect barriers against the encroachments of the national authority.'[1]

Madison also gave frequent expression to similar views.[2]

§ 125. Necessity of a boundary line between state and federal governments.

'If the circumstances of our country are such as to demand a *compound* instead of a *simple*—a *confederate* instead of a *sole* government, the essential points which will remain to be adjusted, will be to discriminate the OBJECTS, as far as it can be done, which shall appertain to the different provinces or departments of power: allowing to each the most ample authority for fulfilling those objects which may be committed to its charge. *Shall the union be constituted the guardian of the common safety?* Are fleets and armies, and revenues, necessary to this purpose? The government of the union must be empowered to pass all laws, and to make all regulations, which have relation to them. The same must be the case in respect to commerce, and to every other matter to which its jurisdiction is permitted to extend. *Is the administration of justice between the citizens of the same state*, the proper department of the local governments? These must possess all the authorities which are connected with this object, and with every other that may be allotted to their particular cognizance and direction.[3]

§ 126. Alienation of state sovereignty in three cases only.

'An entire consolidation of the states into *one complete national sovereignty*, would imply *an entire subordination of the parts;* and whatever powers might remain in them, would be altogether *dependent on the general will.* But as the plan of the convention' (*i. e.* the constitution) 'aims only at a *partial* union or consolidation, the state governments would clearly retain *all the rights of sovereignty which they before had, and which were not, by that act, exclusively delegated to the United States.* This exclusive delegation, or rather *this alienation of state sovereignty*, would only exist in *three cases:* (1.) where the constitution *in express terms*

[1] The Federalist, pp. 408-4.
[2] See The Federalist, No. 46.
[3] The Federalist, No. 23, pp. 105-106.—Hamilton.

granted an exclusive authority to the union: (2.) where it granted, in one instance, an authority to the union, and in another *prohibited the states* from exercising the like authority: and, (3.) where it granted an authority to the union, to which a similar authority in the states would be *absolutely* and *totally contradictory* and *repugnant.* I use these terms to distinguish this last case from another which might appear to resemble it, but which would, in fact, be essentially different: I mean where the exercise of a concurrent jurisdiction, might be productive of occasional interferences in the *policy* of any branch of administration, but would not imply any direct contradiction or repugnancy in point of constitutional authority. These three cases of exclusive jurisdiction in the federal government, may be exemplified by the following instances:—The last clause but one in the eighth section of the first article, provides *expressly*, that congress shall exercise "*exclusive legislation*" over the district to be appropriated as the seat of government. This answers to the first case. The first clause of the same section empowers congress "*to lay and collect taxes, duties, imposts, and excises;*" and the second clause of the tenth section of the same article declares, that "*no state shall*, without the consent of congress, *lay any imposts or duties on imports or exports*, except for the purpose of executing its inspection laws." Hence would result an exclusive power in the union to lay duties on imports and exports, with the particular exception mentioned; but this power is abridged by another clause, which declares, that no tax or duty shall be laid on articles exported from any state; in consequence of which qualification, it now only extends to the *duties on imports.* This answers to the second case. The third will be found in that clause which declares that congress shall have power "to establish an UNIFORM RULE of naturalization throughout the United States." This must necessarily be exclusive: because if each state had power to prescribe a DISTINCT RULE, there could be no UNIFORM RULE.'[1]

[1] The Federalist, No. 32, pp. 140–141. Hamilton.

'The principles established in a former paper teach us that the STATES

§ 127. A fundamental rule of constitutional interpretation.

'It is not a mere possibility of inconvenience in the exercise of powers, but an *immediate constitutional repugnancy*, that can *by implication* alienate and extinguish a pre-existing right of sovereignty. The necessity of a concurrent jurisdiction in certain cases, results from the division of the sovereign power; and the rule, that ALL AUTHORITIES, OF WHICH THE STATES ARE NOT EXPLICITLY DIVESTED IN FAVOR OF THE UNION, REMAIN WITH THEM IN FULL VIGOR, is not only a theoretical consequence of that division, but is clearly admitted by the whole tenor of the instrument which contains the articles of the proposed constitution. We therefind, that notwithstanding the *affirmative* grants of general authorities, there has been the most pointed care in those cases where it was deemed improper that the like authorities should reside in the states, to insert *negative* clauses prohibiting the exercise of them by the states. The tenth section of the first article consists altogether of such [negative] provisions. This circumstance is a clear indication of the sense of the convention, and furnishes *a rule of interpretation out of the body of the act*, which justifies the position I have advanced, and refutes every hypothesis to the contrary.'[1]

§ 128. Parties to the federal constitution.

And who, according to Hamilton, were the *parties* to the constitution? 'Every constitution for the United States must inevitably consist of a great variety of particulars, in which THIRTEEN INDEPENDENT STATES are to be accom-

will retain all *pre-existing* authorities which may not be *exclusively* delegated to the federal head; and that this exclusive delegation can only exist in one of three cases: where an exclusive authority is, in express terms, granted to the union; or where a particular authority is granted to the union, and the exercise of a like authority is prohibited to the states; or where an authority is granted to the union with which a similar authority in the states would be utterly incompatible. Though these principles may not apply with the same force to the judiciary, as to the legislative power; yet I am inclined to think, that they are, in the main, just with respect to the former, as well as to the latter. And under this impression, I shall lay it down as a rule, that the state courts will *retain* the jurisdiction they now have, unless it appears to be taken away in one of the enumerated modes.' Federalist, No. 82, p. 877. Hamilton.

[1] Id. p. 142.

modated in their interests or opinions of interest. . . . . Hence the necessity of moulding and arranging all the particulars which are to compose the whole, in such a manner as to satisfy all THE PARTIES TO THE COMPACT. . . . . The intrinsic difficulty of governing THIRTEEN STATES, independent of calculations upon an ordinary degree of public spirit and integrity, will, in my opinion, constantly *impose* on the national rulers the *necessity of a spirit of accommodation to the reasonable expectations of their constituents.*'[1]

§ 129. We are now in possession of the theory held by the framers of the federal constitution; and by the authors of The Federalist, that is to say, by Madison and Hamilton; for but a very few numbers of that luminous work were written by Jay, and to the theory held by him, those numbers afford no definite clue.[2] It seemed to be of great importance that those original expounders of the constitution should be permitted to speak for themselves; for, not only is their authority unquestioned, but great injustice has been done to their names by writers who have claimed them in support of the imperial school. Let us place beside their views, expressed in their own language, the following singular array of strange propositions, in support of which, not a single reference to any authority is made by their author.

'The collective People of the United States AS A POLITICAL UNIT, existed prior to the adoption of the Constitution, and was not therefore called into being as a consequence of that instrument. The Constitution was not the work of the separate states, regarding those states simply as organized governments, nor of the peoples of those states, regarding those peoples as separate and independent sover-

[1] This was the language of Hamilton in speaking of *amendments* to the federal constitution. See The Federalist, No. 85, pp. 402–408. That he regarded the STATES as the PARTIES and only parties to the constitution, is shown by his language previously quoted, at § 119 and following.

[2] The Federalist is composed of *eighty-five* numbers; of which, *six* only were written by Jay; while Madison contributed *twenty-nine*, and Hamilton, *fifty*.

eign aggregates or communities; but it was the work of the People of the United States as a whole, as a political unit,—not voting together, it is true, in the process of adoption, as a consolidated mass of electors, but, for reasons of policy and convenience, acting in their respective commonwealths. As a necessary consequence, the powers held by the general government were not delegated to it by the several states, regarding those states simply as organized governments, nor by the peoples of the several states, regarding those peoples as separate and independent sovereign aggregates or communities; but were delegated to it by the people of the United States as a whole, abstracted from their local relations to the various commonwealths of which they were also members; although, in the very process of delegation, this one people did not vote together as a consolidated mass of electors, but, for certain reasons of policy and convenience, acted in their respective states. The powers not thus granted by the people of the United States to its general government, were not reserved *by* the several states *to* themselves; for, as these states as such did not grant any powers, they could not reserve any. But they were reserved *by* the People of the United States *to* themselves, or *to* the several states. Thus the People of the United States, AS A NATION, is the ultimate source of all power, both that conferred upon the general government, that conferred upon each state as a separate political society, and that retained by themselves.'

'This, in substance,' says Mr. Pomeroy, 'is the view of the Constitution advocated by Hamilton, by Jay, by Marshall, by Story, by Webster, and upheld by the judgments of the Supreme Court during the earliest years, and while it continued under the leadership of its most illustrious head, Chief Justice Marshall.'[1]

§ 130. Jay's view.

Hamilton maintained that 'THE STATE GOVERNMENTS, BY THEIR ORIGINAL CONSTITUTIONS, ARE INVESTED WITH COM-

[1] Pomeroy's Constitutional Law, §§ 28-29.

PLETE SOVEREIGNTY.'[1] His developed theory we have already given; not in our language, nor on the authority merely of our own assertion, but *in his own words*. It nowhere differed, essentially, from that of Madison; and not a line from the pen of either, points to the adoption of the constitution by the PEOPLE OF THE UNITED STATES AS ONE POLITICAL BODY, or as other than THIRTEEN SOVEREIGN STATES.

The theory of Jay, as already observed, is not to be learned from The Federalist papers: unless we collect it from his opening, wherein he says—'It is well worthy of consideration, therefore, whether it would conduce more to the interest of the people of America, that they should, to all general purposes, be one nation, under one *federal* government, than that they should divide themselves into separate confederacies, and give to the head of each the same kind of powers which they are advised to place in one national government.'[2] He nowhere speaks, in The Federalist, of the adoption of the constitution by *the one body politic;* of which, indeed, no one of that day had any idea. It was he who, in the character of chief justice of the United States, afterward announced and sanctioned the following position: 'Every State Constitution is a Compact, made by and between the citizens of a State, to govern themselves in a certain manner; and the Constitution of the United States is likewise a Compact, made by the people of the United States, to govern themselves, as to general objects, in a certain manner.'[3] In the case before him, he used the phrase, 'people of the United States,' very nearly in accordance with the imperial view above set forth;[4] but it can hardly be supposed, consistently with his known integrity, that he designed to convey the idea that the people of the whole country, in the capacity of *a single political community*, had ordained and established the federal constitution.

[1] The Federalist, No. 31, p. 188.
[2] The Federalist, No. 2, pp. 10–11.
[3] Chisholm Ex'r *v.* Georgia, 2 Dall. Rep. 470–471.
[4] See note to § 110, *ante*.

§ 131. Chief Justice Marshall's position.

Premising that, by some of our leading statesmen and jurists, 'the *states* have been continually confounded with the mere ruling apparatus or *governments* of these societies;'[1] and that Chief Justice Marshall himself, on many occasions, as the following will show, speaks of '*the States in their sovereign capacities*' and the '*State sovereignties*' when only referring to 'the State *governments*;' the theory of that great and eminent jurist shall now be given at length in his own words, and as expressed by him in his judicial capacity.

Delivering the opinion of the Supreme Court of the United States, in McCulloch *v.* The State of Maryland, he said: 'The convention which framed the constitution, was, indeed, elected by the legislatures of the several states. But the instrument, when it came from their hands, was a mere proposal, without obligation, or pretensions to it. It was reported to the then existing congress of the United States, with a request that it might "be *submitted to a convention of delegates, chosen in each state, by the people thereof*, under the recommendation of its legislature, *for their assent and ratification.*" *This mode of proceeding was adopted;* and by the convention, by congress, and by the state legislatures, the instrument was submitted to *the people.* They acted upon it, in the only manner in which they can act safely, effectively, and wisely, on such a subject, by assembling in convention. It is true, they assembled in their several states; and where else could they have assembled? NO POLITICAL DREAMER WAS EVER WILD ENOUGH TO THINK OF BREAKING DOWN THE LINES WHICH SEPARATE THE STATES AND OF COMPOUNDING THE AMERICAN PEOPLE INTO ONE COMMON MASS. Of consequence, when they act, they act in their states. But the measures they adopt do not, on that account, cease to be the measures of the *people* themselves, or become the measures of the state governments. FROM THESE CONVENTIONS THE CONSTITUTION DERIVES ITS WHOLE AUTHORITY. . . . . The assent of the states, in their sovereign capacity, is implied in calling a convention, and

[1] Pomeroy's Const. Law, § 38.

in thus submitting the constitution to the people.[1] But the *people* were at perfect liberty to accept or reject it; and *their act was final.* It required not the affirmance of, and could not be negatived by, the state governments. The constitution, when thus adopted, was of complete obligation, and bound the state sovereignties.

'It has been said, that the people had already surrendered all their powers to the state sovereignties, and had nothing more to give.[2] BUT, SURELY, THE QUESTION WHETHER THEY MAY RESUME AND MODIFY THE POWERS GRANTED TO GOVERNMENT, DOES NOT REMAIN TO BE SETTLED IN THIS COUNTRY. Much more might the legitimacy of the general government be doubted, had it been created by the states. The powers delegated to the state sovereignties, were to be exercised by themselves, not by a distinct and independent sovereignty, created by themselves. To the formation of a league, such as was the confederation, the state sovereignties were certainly competent. But when, "in order to form a more perfect union," it was deemed necessary to change this alliance into an effective government, possessing great and sovereign powers, and acting directly on the people, the necessity of referring it to the *people,* and of deriving its powers directly from them, was felt and acknowledged by all.'[3]

'This government is acknowledged by all to be one of *enumerated* powers. The principle, that *it can exercise only the powers granted to it,* would seem too apparent to have

[1] Here, the sense intended by '*the states, in their sovereign capacity,*' is obvious; for it was not 'the states in their sovereign capacity,' according to the present understanding of the expression, but the *state legislatures,* that called the conventions.

[2] This, in the sense of others, would have meant that the people (whether of each state or of the whole country) had surrendered all their powers to *themselves!* It meant, that the people of each state had surrendered all their powers to their state *government.* The argument which he was refuting, was, that, as the *authority* throughout had been, at foundation, *the action of the state governments, they* were to be considered as the *authors* and *creators* of the federal constitution.

[3] And this was the doctrine, which, as opposed to the argument that *the federal government was created by the state governments,* he was endeavoring to establish.

required to be enforced by all those arguments which its enlightened friends, while it was depending before the people, found it necessary to urge. That principle is now universally admitted. But the question respecting the extent of the powers actually granted, is perpetually arising, and will probably continue to arise as long as our system shall exist.'[1]

The language of the same great judge in Gibbons *v.* Ogden, is this:—

'As preliminary to the very able discussion of the constitution, which we have heard from the bar, and as having some influence on its construction, reference has been made to the political situation of these states, anterior to its formation. It has been said, that they were sovereign, were completely independent, and were connected with each other only by a league. This is true. But, when these allied sovereigns converted their league into a government, when they converted their congress of ambassadors, deputed to deliberate on their common concerns, and to recommend measures of general utility, into a legislature, empowered to enact laws on the most interesting subjects, the whole character in which the states appear, underwent a change, the extent of which must be determined by a fair consideration of the instrument by which that change was effected.'[2]

§ 182. No doubt can hence be entertained of the theory of Chief Justice Marshall. The sense in which he employed certain phrases or expressions, was, without doubt, a perversion of their strict political meaning. He speaks of the *governments*, state and federal, as so many *sovereignties*. 'The powers delegated to the *State sovereignties* were to be exercised *by them, not by a distinct and independent sovereignty, created by themselves.*' But his meaning cannot be mistaken.

'No political dreamer was ever wild enough to think of breaking down the lines which separate the states,

[1] 4 Wheat. 316; 4 Pet. Cond. 471–473.
[2] 9 Wheat. 1; 5 Pet. Cond. 565.

and of compounding the American people into one common mass.' This is a very complete answer to the *imperial* theory; though no political dreamer of that day had been wild enough to think of seriously proposing it. In answer to the argument, 'that the *people* had already surrendered all their powers to the State *sovereignties*, and had nothing more to give,' he replies,—'*But, surely, the question whether they may resume and modify the powers granted to government, does not remain to be settled in this country*,'—doubtless referring to the action of the colonies in resuming to themselves the powers which had been vested in the government of Great Britain, and to the action of the states in resuming the powers which had been vested in the government of the United States by the Articles of Confederation; not meaning, I apprehend, that the question, whether the people of any *one* state may resume and modify the powers granted to the general government, did not remain to be settled in this country; although he had spoken of the people throughout in a manner and connection that might seem to bear that construction.[1]

[1] An ambiguous use of terms and phrases is not always to be easily avoided. But to correct such fallacies as arise therefrom, in our political law, we have only to examine the *things* themselves which are the *objects* of that law, and ascertain *their proper relations*. We must never lose sight of the first great principle of our system, that '*all power is inherent in the people;*' that is, in the original sovereigns, the *co-equal members* of the *political* body or state, who are properly termed '*electors*.' These are they who make and unmake the organic law,—our *constitutions*, which are the only legitimate expression of the sovereign will. The principles and provisions of these constitutions, are intended to be carried into practical operation and effect, by means of certain enumerated powers which are therein delegated to such *officers* as may from time to time be elected by and from among the electors. These *officers* are the *government*, though nothing but agents with their instructions written in the constitutions and laws under which they are elected. These *three* things, '*electors*' who are *sovereign*, '*constitutions*' which express *their will*, and '*officers*' who are agents to carry out that will—these are the *essentials* and the only essentials of our political system; and therefore, whether we have three names or three hundred by which to call them, we know that only three things can be intended. The 'electors' are not one single body of people. They are many, sev-

§ 133 Webster's doctrine.

Justice Story was, unquestionably, an advocate of the theory imputed to him, and also adopted, by Mr. Pomeroy.[1] But his materials therefor were mere assertions, again and again disproved by the records themselves, and his method, that of all the imperialists, a careful and studious attempt to obscure the records, or deny their veracity. I cannot but wish, for the sake of the dignity of the jurist's vocation, that so serious a charge could not in justice be made. But the records are before me.[2]

A different theory, was that of the immortal Webster. Witness his justly celebrated letter to the Barings of

eral, sovereign and independent bodies; and each of these bodies is a political state. To say it is not sovereign, is to contradict our fundamental doctrine, that 'all power is inherent in the people.' If indeed it were true, that the *governments* of the states, which Chief Justice Marshall called the *state sovereignties*, were *sovereign;* then, as *they* (by their commissioners in the general convention) *framed* the constitution, and *referred* it to the people, it might be said that the people acted by their permission, that the *sovereignties* which framed and ordained it, were the *governments* of the states—*i. e.*, the *state officers*.

[1] See § 129, *ante*.

[2] Story may hardly be said to have *argued* the imperial or absolutist theory. It was reserved to Pomeroy to give it its true form. The learned 'Griswold Professor of Political Science in the University of New York' is certainly aware of the 'infinite regress' imposed upon the bold adventurer in search of 'the political unit that lies behind.' But he cautiously touches but one of the links of the infinite chain. Once adopt the principle of his reasoning, and we are lost in the clouds. Let us, at some risk, pursue it a moment. The several states composing the united States, are the creatures of the one body politic composed of the whole people of the United States. The United States, as states united, and the several states, as separate political societies, are in a position of permanent subordination to 'the political unit that lies behind'—*i. e.*, the PEOPLE of the United States. (Pomeroy's Const. Law, §§ 42 *a*, 43.) This upon the imperial authority of the imperial principle—the absolute authority of the absolutist! But if the principle be authority for Americans, we must stand by it. Thus, then, the PEOPLE of the United States—'the political unit that lies behind' our political constitutions, is a creature of, and in a position of permanent subordination to, HUMANITY—the people of the whole world: the PRINCIPLE OF HUMANITY is thus the SOVEREIGN of the whole human race. But the process of this reasoning demands 'the political unit that [still] lies behind.' Behold, then! humanity is the creature of, and in a position of permanent subordination to—GOD; the 'I AM' that pervades it and

London, in 1839.—'Your first inquiry is, "Whether the Legislature of one of the States has legal and Constitutional power to contract loans at home and abroad?" To this I answer, that the Legislature of a State has such power; and how any doubt could have arisen on this point, it is difficult for me to conceive. EVERY STATE IS AN INDEPENDENT, SOVEREIGN POLITICAL COMMUNITY, except in so far as certain powers, WHICH IT MIGHT OTHERWISE HAVE EXERCISED, have been conferred on a General Government, established under a written Constitution, and exerting its authority over the people of all the States. This General Government is a limited Government. Its powers are specified and enumerated. All powers not conferred upon it still remain with the States and with the people. The State Legislatures, on the other hand, possess all usual and extraordinary powers of Government, subject to any limitations which may be imposed by their own Constitutions, and with the exception, as I have said, of the operation on those powers of the Constitution of the United States.'[1] It should be observed, that these were the serious and mature convictions of a giant mind, not colored or warped, as on some previous occasions, by the heat of partisan debate.

As to 'the judgments of the Supreme Court during its earliest years, and while it continued under the leadership of its most illustrious head, Chief Justice Marshall;' these judgments, as we have seen and shall see, instead of supporting the imperial theory, are, so far as their authority goes,[2] in direct opposition thereto.[3] They fully support the doctrine of Webster, that 'Every State is an independ-

gives personality to everything that can feel and say 'I am.' But what was that inexorable fate decreed for him who should search for 'the political unit that lies behind'? He who will reason, is doomed to follow the light of reason. Reason, upon the principle adopted, demands a continuance of the search; she demands, in the name of that principle, 'the political unit that [still] lies behind.'

[1] See Nile's Register, Vol. LVII, pp. 273–274.

[2] As to the questions beyond the jurisdiction of this Court, see *post*, § 147 *et seq.*

[3] Some of these judgments were formerly referred to in § 56 *et seq.*

ent, sovereign political community, except so far as certain powers, which it might otherwise have exercised, have been conferred on a General Government.' Let us notice first the *original* authorities for this proposition.

§ 134. State sovereignty.

The original authorities are found in *the sovereign legislation by 'the people'* themselves. This sovereign legislation appears, *for the very first time, in the several constitutions of the original states.* The establishment of a state constitution, is, of itself, the highest act of political sovereignty. And what do the state constitutions proclaim? The sovereignty of their authors, as a matter of course. Thus that of Massachusetts: 'The people of this commonwealth have the sole and exclusive right of governing themselves as a free, sovereign, and independent state; and do, and forever hereafter shall, exercise and enjoy every power, jurisdiction, and right, which is not, or may not hereafter be, *by them* expressly delegated to the United States of America in congress assembled.'[1] That of New Hampshire speaks the same language.[2] Clauses expressing or implying the same will be found in all. Yet these or the like declarations were wholly unnecessary. The bodies who ordain and establish the organic law, either of the states or of the United States, cannot but be sovereign, free and independent. And who these are, or were, the *records* of their sovereign legislation have plainly disclosed.

'The ratification of the *conventions* of *nine states* shall be sufficient for the establishment of this constitution *between the states* so ratifying the same.' So says the federal constitution itself.[3] It was the plan of the convention that framed it, 'that it should be submitted to a *Convention of Delegates, chosen by each state by the people thereof,* under the recommendation of its legislature, *for their assent and ratification.*'[4] The assent of the several states, each acting by its own authority, as we have seen from the records themselves, was given in the manner proposed by the gen-

[1] Const. Mass. Pt. I. Art. 4; Pt. II. first paragraph; also ch. VI.
[2] Const. N. H. Pt. I. Art. 7.
[3] See the last article.
[4] See *ante* § 88 *a*.

eral convention of the states. 'This assent and ratification, was to be given by the *people*, not as individuals composing one entire nation, but *as composing the distinct and independent states* to which they respectively belonged. And *each state*, in ratifying the constitution, was considered as *a sovereign body*, independent of all others, and only to be bound by its own voluntary act.'[1] So said Madison; and with him, one and all of the Nationals (the party which had advocated a strong national government in the general convention) were fully agreed.

'The enumeration in the constitution of certain rights, shall not be construed to deny or disparage others retained by the people. The powers not delegated to the United States by the constitution, nor prohibited by it to the states, are reserved to the states respectively or to the people.' So again says the federal constitution.[2] It is asked by *whom* were they so reserved? The answer is plain. 'The body which conferred portions of its powers upon the government which it had created, is alone capable of reserving the residuum to itself, or to any other body.'[3] That body, as we have seen, was the *body of electors*, 'the people,' of each state.[4]

And what, upon the question, is the doctrine of the Supreme Court of the United States? So late as 1842, in a case where the question of state sovereignty was of primary importance and directly before it, that court held, that 'WHEN THE REVOLUTION TOOK PLACE, THE PEOPLE OF EACH STATE BECAME THEMSELVES SOVEREIGN; and, in that character, hold the absolute right to all their navigable waters and the soils under them, for their common use, subject only to the rights since surrendered by the constitution to the general government:'[5] 'and when the people of New Jersey took possession of the reins of gov-

[1] The Federalist, No. 39, pp. 176–7; No. 40, pp. 181–182.

[2] Art. IX and X, Amendments.

[3] Pomeroy's Const. Law, § 101.

[4] See the several ordinances of ratification, under § 85. We are wholly at a loss to find the ordinance of ratification by 'the people of the United States.'

[5] Martin *et al.* v. Waddell, 16 Peters, 367–410.

ernment, and took into their own hands the powers of sovereignty, THE PREROGATIVES AND REGALITIES WHICH BEFORE BELONGED EITHER TO THE CROWN OR THE PARLIAMENT, BECAME IMMEDIATELY AND RIGHTFULLY VESTED IN THE STATE.'[1]

It is unnecessary to refer to the earlier decisions of the Supreme Court of the United States, in which the sovereignty of the 'people' has been recognized as identical with the sovereignty of the states as political communities. For, notwithstanding all that was said and written in support and defence of the (not unnatural) tendency of things toward centralization during the late war, the present language of that court is in perfect accord with the federal theory. 'A State,' says that court, 'in the ordinary sense of the [Federal] Constitution, is a *political community* of free citizens, occupying a territory of defined boundaries, and organized under a government sanctioned and limited by a written Constitution, and established by the consent of the governed. It is the union of such States under a common Constitution, which forms the distinct and greater *political* unit, which that Constitution designates as the United States.'[2] In the same case, that court declares, that 'the preservation of the States and the maintenance of their governments, are as much within the design and care of the [Federal] Constitution, as the preservation of the Union and the maintenance of the national government;' and that 'The Constitution, in all its provisions, looks to AN INDESTRUCTIBLE UNION COMPOSED OF INDESTRUCTIBLE STATES.'

§ 185. Internal sovereignty of a state inalienable.

The true theory of state sovereignty, put in a simple form, seems to be this:—The American colonies, by the Revolution, became severally free, sovereign and independent states.[3] Now it is a principle of universal law, that a state once sovereign, cannot, by any league, treaty, compact, or other act of its will, substantially transfer, cede or alien, any essential of its self-existence as a sover-

[1] Martin *et al. v.* Waddell, 16 Peters, 416. See the cases to this point cited in note to § 142 *post*.

[2] Texas *v.* White, 7 Wall. 721.

[3] See § 184 above.

eign state.[1] Every essential of its self-existence, therefore, each state retains; and consequently each state may do at all times whatever it shall judge to be necessary in order to preserve its existence. But states may doubtless confederate together for their common advantage, and bind themselves to abide the decision of a given majority of their number in matters equally affecting the welfare of all. In which case, as no one among equals is competent to make law for another, no one can insist on its own construction of its duties and rights in relation to the others. No state is so sovereign as to be able to do that.

The argument is drawn from the nature of man. All men by nature are *equally* free, sovereign and independent. No man can cede, transfer or alien, by any agreement, compact, or other act of his will, any essential of his self-existence as a morally responsible being; and therefore may at all times, and under all circumstances alike, do whatever he shall judge to be necessary to his self-preservation; to the preservation, we may say, of his own inherent and inalienable right of internal self-government. Now if a man cannot part with this right, neither can a body of men, a political community or state. If, however, a man can oblige himself, by his free consent, and without parting with his right of internal self-government (his essential liberty or freedom), to obey such laws as are founded in common consent, and so become a member of a political society or state; so can bodies of men, political societies or states, without ceding their sovereignty, or in-

[1] 'This doctrine,' says Mr. Pomeroy (in his Constitutional Law, note to § 55), 'that a sovereign state cannot bind itself by any treaty or compact by which its sovereignty is wholly or substantially surrendered or lessened, is now maintained by the leading writers on Public and International Law.' He cites Martens, *Precis du Droit des Gens*, § 52 (Paris, 1864); Ortolan, *Diplomatie de la Mer*, lib. I, ch. v, p. 90 (Paris, 1864); Hautefeuille, *Des Droits et des Devoirs des Nations Neutres*, t. I, pp. 8–10 (Paris, 1858); Heffter, *Droit International Public*, § 88 (Paris, 1866); Pinheiro-Ferreira, *note* to § 58 of Martens (Ed. of 1864). These are standard authorities; many others might also be added; but the doctrine has never been questioned, I believe, when properly stated, by any respectable authority. No state in the world is sovereign, properly speaking, except in relation to its own *internal* affairs.

ternal right of self-government, oblige themselves, in like manner, to obey such laws as are made by common consent, and so become members of a larger society or confederacy of states. If such a confederacy amounts to nothing but 'a rope of sand,' the same is true of the union of individuals composing a state. Whether we apply the argument to individuals or to states, the result is the same. If our system is to rest on the natural, inherent, and inalienable rights of man, the veracity of the argument must be conceded in relation to each individual, considered as an equal member of the state. If the states, in our system, are essential to the security of those rights, the soundness of the argument is not to be questioned in relation to each state, considered as a member of the union.

§ 136. The only escape from the tyranny of majorities.

The maintenance of the boundary line between the *internal* and *external* sovereignty of states, as well as of individuals,[1] upon which the doctrine of *inalienable* rights is founded, is the only possible escape from the tyranny of factions and majorities in governments resting on common consent. For, as is self-evident, if *every right* be subject to the will of the majority, not even the rights of conscience can be secure: our declarations of inherent and inalienable rights, contained in our constitutions, must pass for naught. It must not be overlooked, that our American political system was originally proposed and established upon the basis of *the natural and inalienable rights of man;* that all was done for the sole and exclusive purpose of *securing the enjoyment of those rights to each and to every individual;* and that *the states* were supposed to be quite as necessary a means to this end as the *union* of the states.[2] It cannot be pretended that the *basis* was unsound, that the *purpose* was illegitimate, or that the *means* were unnecessary. Nature herself takes care, that the separate and distinct organization, the self-existence, of each of the individual members of the state, shall be continued and preserved; that their lives and energies shall not be

[1] *Ante*, §§ 13, 14, 15.
[2] *Ante*, § 121.

moulded into a single consolidated mass of flesh and blood, and their moral and intellectual capacities centered in a single head. It is equally essential that the independent organization, the internal sovereignty and self-existence, of each of the states of the union should be inviolably secured and preserved, in order to prevent our scheme of self-government from proving an absolute failure, and the government of the union from becoming an imperial, despotic, and irresponsible head. This has never been questioned, and will never be denied, by any true friend of the cause of humanity. Nor can it be doubted, that the right of self-preservation, though not an inherent or necessary attribute of any political government, inheres in each separate community of men considered as a state, in the very same sense that it inheres in every man regarded as a natural individual, and cannot be ceded or aliened to another. If, then, each state, as each individual member of society, is to be secured and preserved in its full, essential and necessary integrity,—in all that is essential to its self-support and self-existence,—it unquestionably follows, that each state must have, at all times, and under any and all circumstances, the sovereign right to do whatever it may judge to be absolutely necessary to such, its own security and self-preservation.

The question for the people is therefore reduced to this:—Shall we continue to have a UNION OF STATES, or shall we make it A SINGLE, CENTRAL, IMPERIAL AND DESPOTIC GOVERNMENT?

§ 187. May the union be dissolved?

No doubt the people of this country are determined, and have always been determined, to have, maintain and preserve, A UNION OF STATES. The *name* they have chosen for themselves, 'THE UNITED STATES of America;' THE FLAG OF OUR UNION, with its ever glorious Stars, emblems of States United are their sovereign, sacred, and patriotic pledges to each other, of this their unwavering and invincible determination.

But, it is said, if our union be only a union of states, it *may* be *rightfully dissolved by the states!* This is unques-

tionably true. And it is equally true, that if it were a union of individuals, it might be as rightfully dissolved by those individuals. In the words of Chief Justice Marshall, 'the question whether the people may resume and modify the powers granted to government, does not remain to be settled in this country.'[1] Neither man, humanity, nor political states, can create what cannot be destroyed. 'The United States' may be possibly destroyed by an amendment to the federal constitution—carried by a strict party vote in three-fourths of the state legislatures! Let us hope that the spirit of our people will brook no such usurpations upon their sovereign will.

It has also been said, that if the union be only a union of states, a *single state* may rightfully dissolve it at pleasure. This is *not* true. Let us carefully examine the argument for this position, and we shall find that it rests on a misapplication of the principle that a sovereign is bound by no law but his will.

That a sovereign is bound by no law but his will, is true, in the relations of men to one another, only in one sense; that is, as applied to *internal* self-government. It means that a man has a right to do as he wills concerning the direction and control of his own *internal* affairs, affairs relating to none but himself. As extended to the sovereign power of a state, it means that that power may do as it wills in relation to the *internal* government of the state. If it were true in any other sense, then, among equals, one were subject to the government of another: a flat contradiction of terms would emerge. The power of a sovereign legislature to repeal its enactments, is deduced from this *internal* right of self-government. Yet this is construed as a warrant for a state to repeal its original ratification of the federal constitution, and to so attempt a dissolution of the union; as though that were a matter concerning no one but itself! As well might a man, by virtue of his right of *internal* self-government, attempt the dissolution of the state of which he is a member—do as he wills, and bid defiance to its laws.

[1] 4 Wheat. 404.

In support of the so-called right of secession, great importance is attached to the argument, that *it was only by its ordinance of ratification* that any one state became a party to the federal constitution; that therefore it may, by a repealing ordinance of a convention of its people, rescind the ordinance of ratification, and dissolve its relations and connections with the union.[1] As a maxim of universal law, it is everywhere admitted, that 'Nothing is so consonant to natural equity as that every compact should be dissolved by the same means that rendered it binding.' But is it strictly true, that it was *only by its own ordinance* that any state became a party to the constitution? It will be remembered, that the last article of the instrument contained a *condition* upon which it should become binding, viz., that it be ratified by *nine* states at least; so that, had it been ratified by *eight* only, their ratifications could have had no effect. Did the ratification of the *ninth* state, *in and of itself*, make it binding upon *all?* Certainly not; *that* ratification was of no higher authority than any of the others; it only fulfilled the *condition* upon which *one and all* had agreed to be bound. When *two* or more have made a contract, it is certainly not for any *one* to say that *he* made it and may therefore annul it. The constitution was indeed a *compact*, to which it was necessary, by its terms, that *nine* should accede, and to which, in fact, the *thirteen* states assented. Now apply the maxim. The *means* that rendered the constitution binding, was the ASSENT OF ALL THE PARTIES. By the ASSENT OF ALL THE PARTIES, then, it may be dissolved. So long as it is considered a *compact*, so long we are clear of the argument for secession. For no one ever imagined that a compact or contract could be rightfully dissolved by *one* of the parties to it, without the assent of the others. *Natural equity requires, that whatever affects or concerns all, should have the approbation of all.* And this is a maxim of universal law, no less than the one first mentioned. In fine, independently of compact, no state or nation can rightfully determine, by any mere act of its

[1] See Stevens's Constitutional View of the War, Vol. I, pp. 19–20, *et seq.*

own, any one matter or thing, in relation to which, others with itself are equally concerned. It is only in relation to itself, and its own internal affairs, that the sovereignty of one is exclusive of another, and the action of one independent of external control. In relation to others, or matters of common and equal concern, it has no more than an equal voice; and is therefore subject to the voice of the majority. For among equals, the law of equality is the law of nature and of nations.

§ 138. The right to resume the powers of government.

But was not the right of the people of each state, to resume the powers of government, by *some* of the states expressly reserved in their ordinances of ratification? The first amendment of the federal constitution proposed by the ratifying conventions of Massachusetts and New Hampshire, was in these words: 'That it [the Constitution] explicitly declare, that all powers not expressly delegated by the aforesaid Constitution are reserved to the several states to be by them exercised.' South Carolina (in her ordinance) declared, 'that no section or paragraph of the said Constitution warrants a construction that the States do not retain every power not expressly relinquished by them and vested in the General Government of the Union.' Virginia, 'that the powers granted under the Constitution, being derived from the people of the United States, may be resumed by them, whensoever the same shall be perverted to their injury and oppression.' New York, 'that the powers of Government may be re-assumed by the people, whensoever it shall become necessary to their happiness; that every power, jurisdiction, and right, which is not by the said Constitution clearly delegated to the Congress of the United States or the departments of the Government thereof, remains to the people of the several States, or to their respective State Governments, to whom they may have granted the same: . . . . . Under these impressions, and declaring that the rights aforesaid cannot be abridged or violated, and that the explanations aforesaid are consistent with the said Constitution, and in confidence that the amendments which have been proposed to the

said Constitution will receive an early and mature consideration: We, the said Delegates, in the name and in the behalf of the people of the State of New York, do, by these presents, assent to and ratify the said Constitution.' North Carolina declared, that 'each State in the Union shall respectively retain every power, jurisdiction and right, which is not by the Constitution delegated to the Congress of the United States, or to the departments of the general Government; nor shall the said Congress, nor any department of the said Government, exercise any act of authority over any individual in any of the said States, but such as can be justified under some power particularly given in the Constitution; but the said Constitution shall be considered at all times a solemn instrument defining the extent of their authority.' Rhode Island, 'that the powers of government may be resumed by the people, whensoever it shall be necessary to their happiness;' etc. etc., following in the very same language of New York.[1]

§ 139. The foregoing declarations of Massachusetts, New Hampshire, and North Carolina, were made by way of proposing amendments; those of South Carolina, Virginia, New York, and Rhode Island, by way of declaring the 'impressions' under which they acted in ratifying the instrument. As responsive to those proposing amendments ought to be considered the first ten amendments to the instrument, the ninth and tenth of which are these:—'The enumeration in the Constitution of certain rights, shall not be construed to deny or disparage others retained by the people.' 'The powers not delegated to the United States, by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people. '*To the states respectively, or to the people.*' '*The states*' here intended, are the *state governments.* '*The people*' intended, are 'the people' who ratified the constitution, the body of electors composing any one state, and speaking in their ordinance of ratification; that is to say, *the people of each state:* for the people of the United States, as one political body, had, as

[1] See the several ordinances of ratification, *ante*, §§ 85–86.

we have seen, nothing whatever to do with establishing either the federal or the state constitutions, and never once, in fact, were known in our political history. Even the assent of the American people as one body, is as clearly unevidenced as the assent of the European people as one body, to the European governments. In connection with the declarations of the 'impressions' under which the states acted, in ratifying the constitution, should also be considered the declarations of sovereign rights by the states themselves in their several state constitutions;[1] as well as the fact that the section of the federal constitution concerning the mode of amending that instrument, was a part of the original in view of which those 'impressions' were declared, and that therefore the declarations of the right to resume the powers delegated, could not have been made with reference to any action by way of amendment.

§ 140. But if any one of the states, or the people of any one state, can be said to have reserved a power, jurisdiction or right, the same must be said of every other: for, as in a union or state composed of free persons, so in a union of states, all are necessarily equal in right.[2] Partisans tell us that the question is settled, and forever put at rest, by the results of the *war* for the suppression of the late rebellion. Would they have us believe that ours is a government of *force*, and not of common consent? What assurance have they that a government founded in force will not be soon overturned, and its founders and supporters brought to the bar of the people? Let us stand on safer ground. '*For, in politics as in religion, it is equally absurd to aim at making proselytes by fire and sword. Heresies in either can rarely be cured by persecution.*'[3] Whether the right in question, the right to resume the delegated powers, was

[1] See 'Declaration or Bill of Rights,' to the General Form of a State Constitution, under § 75, *ante*.

[2] Nor can congress incorporate into an act admitting a new state, conditions which would place the state in an unequal position with the other states. 3 How. U. S. 212.

[3] John Jay, in No. 1 of The Federalist.

or was not reserved by the states as sovereign political communities, can, I apprehend, be authoritatively decided and settled only by a constitutional majority of the sovereign courts or conventions of the people;[1] not by any act of any instituted government, nor by any decision of any instituted court, but only in the manner in which the constitution itself was originally ordained and established. For, the acts of government, state or federal, are nothing but the acts of agents, and therefore cannot be competent to the settlement of a question of the paramount sovereignty of the people: a truth which makes amendments to our constitutions, *so far as they affect that sovereignty*, null and void, or at least of but little value, when such amendments are made by the state legislatures, and not submitted to the people. It should be recollected, that 'The sovereignty of Government,' as the great Webster once said, 'is an idea belonging to the other side of the Atlantic. No such thing is known in North America. With us, all power is with the people. They alone are sovereign; and they erect what Governments they please. None of these Governments is sovereign.'[2]

So far, however, as relates to the right of the people of a single state, to resume the power it joined in granting to the federal governments; it is certainly clear from what we have seen, that no such right can exist.[3] If it could indeed be supposed to exist, it would be nothing but the right of one state to give all the others a just cause of war! The so called right of secession is such, that it cannot be stated except as a self-contradiction. It is nothing at its foundation but the right of a man to violate the rights of his neighbors, usurp their common liberties, and destroy their common peace.

§ 141. Principles of the Union.

It has now been fully shown that our UNION is a UNION OF STATES, as its name imports, and not a union of individuals; that a UNION OF STATES is possible only as based

[1] See § 150, *post*.

[2] Webster's Speech (in the U. S. Senate) on the Calhoun Resolutions, 1833. See Niles' Reg. Vol. XLIII, App. p. 170.

[3] See above, § 137.

upon an organic law, established by them in their several sovereign capacities, and fixing the boundary line between the internal sovereignty of each and the external sovereignty of all; that this boundary line was present to the minds of the convention that framed the federal constitution; that they adopted the principle, that 'whatever object of government is confined in its operation and effects within the bounds of a particular state, should be considered as belonging to the government of that state, and whatever object of government extends, in its operation and effects, beyond the bounds of a particular state, should be considered as belonging to the government of the United States;' that to lessen or remove the difficulty, arising from *discretionary construction* on this subject, an *enumeration* of the particular instances, in which the application of the principle ought to take place, was attempted with much industry and care;'[1] and that, as to the federal government, 'its jurisdiction extends to certain *enumerated objects* only; its *general powers are limited;* and the states, *in all unenumerated cases,* are left in the enjoyment of their sovereign and independent jurisdiction.'[2]

§ 142. *Construction* of federal powers.

It is therefore clear, that it is only in relation to the powers specifically *enumerated* in the federal constitution, as being conferred on the government thereby created, that any question can ever arise concerning the intended and legitimate operation of that government, or the appropriate sphere of its action; and that here, in determining the scope of its powers, the fundamental rule of interpretation and construction, is furnished by the principle that governed the convention of the states in framing the written expressions by which in terms those powers were conferred: the principle that limits the scope of those powers to 'whatever object of government extends, in its operation and effects, beyond the bounds of a particular state.'

To illustrate this, let us instance the power which is

[1] See § 112, *ante.*

[2] Federalist, pp. 178, 182.

given to congress 'To regulate commerce with foreign nations, and among the several states, and with the Indian tribes.'[1] It is very well known that the power to regulate commerce, was considered as one essentially necessary to the federal government. Now, does this power, by the terms in which it is given, extend to the regulation of the *internal* commerce of a state? The terms are, '*among* the several states;' not, *as between* the several states. Perhaps there might be a doubt, if no rule of interpretation and construction were given. But we have such a rule in the principle above stated. The *internal* commerce of a state, is not an object of government which extends, in its legitimate or necessary operation and effects, beyond the bounds of that state. It has therefore been decided by the Supreme Court of the United States, that the grant to congress of the power in question, does not extend to or embrace the purely *internal* commerce of a state; and that that commerce is necessarily left to the regulation under state authority.[2]

In the words of Chief Justice Marshall, again, 'The genius and character of the whole government seem to be, that its action is to be applied to all the EXTERNAL concerns of the nation, and to those internal concerns [of the nation] WHICH AFFECT THE STATES GENERALLY, but not to those which are completely within a state, when they do not affect other states, and with which it is not necessary to interfere for the purpose of executing some of the general powers of the government.'[3]

[1] Const. U. S. Art. 1, § 8.

[2] 21 How. U. S. Rep. 246, 247. See Am. Law Reg. for July, 1868, pp. 520, 521. The principle of leaving each state free to the management of its own *internal* affairs, and confining the operation of federal powers to their *external* relations, that is, to things in which all alike are equally interested, is fully established by the Supreme Court of the United States, as furnishing a criterion for the construction of those powers, by the following cases:—Gibbons *v.* Ogden, 9 Wheat. 1, 193, 194, 208; Wilson *v.* Blackbird Creek Co., 2 Pet. 245; Cooley *v.* Port Wardens, 12 How. U. S. Rep. 299; Gilman *v.* Philadelphia, 3 Wallace's Rep. 713; New York *v.* Miln, 11 Pet. 102, 138; Smith *v.* State of Maryland, 18 How. U. S. Rep. 71.

[3] Gibbon *v.* Ogden, 9 Wheat. 194.

§ 148. Supremacy of federal laws.

It is certainly clear, that the government of the United States can exercise no powers but such as are actually granted to it by the federal constitution; and that the powers actually granted, can be such only as are *expressly* given, or given by *necessary* implication.[1] On the other hand, it is also clear, that *within the sphere* marked out for that government, it is clothed with *supreme* jurisdiction.[2] The language of the sovereigns here is—'This Constitution, and the laws of the United States which shall be made *in pursuance thereof*, and all treaties made or which shall be made under the authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the constitution or laws of any State to the contrary notwithstanding. The senators and representatives before mentioned, and the members of the several State legislatures, and all executive and judicial officers, both of the United States and of the several states, shall be bound by oath or affirmation to support this Constitution.'[3]

This *supremacy* clause was much debated pending the adoption of the constitution, and the objections thereto called forth, in a number of 'The Federalist,' the following exposition and defence thereof, from the distinguished leader of the national party, Alexander Hamilton. 'But, it is said, the laws of the union are to be the *supreme law* of the land. What inference can be drawn from this, or what would they amount to if they were not to be supreme? It is evident they would amount to nothing. A LAW, by the very meaning of the term, includes supremacy. It is a rule which those to whom it is prescribed are bound to observe. This results from every political association.[4] If individuals enter into a state of society, the

[1] Martin *v.* Hunter' Lessee, 1 Wheat. 326, *per* Justice Story.

[2] See 4 Wheat. 405–6, *per* Marshall, C. J.

[3] Const. U. S. Art. VI.

[4] This doctrine was admitted and applied in relation to the federal laws made *pursuant* to the Articles of Confederation. In Ware *v.* Hylton, 3. Dall. Rep. 199, 285, Judge Chase says:—'It seems to me that treaties made by Congress, according to the Confederation, were superior to the laws of the States, because the Confederation made them

laws of that society must be the supreme regulator of their conduct. If a number of political societies enter into a larger political society, the laws which the latter may enact, pursuant to the powers entrusted to it by the constitution, must necessarily be supreme over those societies, and the individuals of whom they are composed.[1] . . . . . But it will not follow from this doctrine, that acts of the larger society, which are *not pursuant* to its constitutional power, but which are invasions of the residuary authorities of the smaller societies, will become the supreme law of the land. These will be merely acts of usurpation, and will deserve to be treated as such. Hence we perceive, that the clause which declares the supremacy of the laws of the union, *only declares a truth*, which flows immediately and necessarily from the institution of a federal government. It will not, I presume, have escaped observation, that it *expressly* confines this supremacy to laws made *pursuant to the constitution;* which I mention merely as an instance of caution in the convention, since that limitation would have been to be understood, though it had not been expressed.'[2]

§ 144. Mr. Madison, however, seems not to have regarded this *supremacy* clause as merely declaratory of '*a truth*, which flows immediately and necessarily from the institution of a federal government.' He thought that, 'without it, the constitution would have been evidently and radically defective. To be fully sensible of this,' he said 'we need only suppose for a moment, that the supremacy of the state constitutions had been left complete, by a saving

obligatory in all the States. They were so declared by Congress, on the 18th of April, 1787; were so declared by the Legislatures and Executives of most of the States, and were so decided by the Judiciary of the General Government, and by the Judiciaries of some of the State Governments.' See also 'The Federalist,' No. 88, p. 172.

[1] This passage should be noticed, as showing that Hamilton did not belong to those 'political dreamers,' who, in the words of Chief Justice Marshall, were wild enough to think of breaking down the lines which separate the states, and of compounding the American people into one common mass.' See above, § 131.

[2] The Federalist, No. 33, p. 145.

clause in their favor. In the first place,' he argued, 'as these constitutions invest the state legislatures with absolute sovereignty, in all cases not excepted by the existing articles of confederation, all the authorities contained in the proposed constitution, so far as they exceed those enumerated in the confederation, would have been annulled, and the new congress would have been reduced to the same impotent condition with their predecessors. In the next place, as the constitutions of some of the states do not even expressly and fully recognize the existing powers of the confederacy, an express saving of the supremacy of the former would, in such states, have brought into question every power contained in the proposed constitution. In the third place, as the constitutions of the states differ much from each other, it might happen that a treaty or national law, of great and equal importance to the states, would interfere with some and not with other constitutions, and would consequently be valid in some of the states, at the same time that it would have no effect in others.'[1] But without such saving of the supremacy of the state constitutions, we may safely assume, with Hamilton, that the supremacy of the federal constitution, and of the laws and treaties made in *pursuance* thereof, would have necessarily resulted from the mere institution of a federal government.

The oath of fidelity clause,—the propriety of which was also questioned, not only in the convention, but pending the adoption of the constitution,—Mr. Madison explained as follows:

'It has been asked, why it was thought necessary, that the state magistracy should be bound to support the federal constitution, and unnecessary, that a like oath should be imposed on the officers of the United States, in favor of the state constitutions? Several reasons might be assigned for the distinction. I content myself with one, which is obvious and conclusive. The members of the federal government will have *no agency in carrying the state constitutions into effect.* The members and officers of

[1] The Federalist, No. 44, p. 211.

the state governments, on the contrary, will have an essential agency in giving effect to the federal constitution. The election of the president and senate will depend, in all cases, on the legislatures of the several states. And the election of the house of representatives will equally depend on the same authority in the first instance; and will, probably, forever be conducted by the officers, and according to the laws, of the states.'[1]

§ 145. *Extent* of federal powers.

The last clause of the eighth section of the first article of the federal constitution, authorizes the federal legislature 'to make all laws which shall be necessary and proper, for carrying into execution the powers by that constitution vested in the government of the United States, or in any department or officer thereof.' This clause also, pending the adoption of the constitution, was the subject of much discussion; and was considered by Hamilton in connection with the supremacy clause. 'It may be,' he said, 'affirmed with perfect confidence, that the constitutional operation of the intended government would be precisely the same, if these clauses were entirely obliterated, as if they were repeated in every article. They are only declaratory of a truth, which would have resulted, by necessary and unavoidable implication, from the very act of constituting a federal government, and vesting it with certain specified powers. ..... What is a power, but the ability or faculty of doing a thing? What is the ability to do a thing, but the power of employing the *means* necessary to its execution? What is a LEGISLATIVE power, but a power of making LAWS? What are the *means* to execute a LEGISLATIVE power, but LAWS? What is the power of laying and collecting taxes, but a *legislative power*, or a power of *making laws*, to lay and collect taxes? What are the proper means of executing such a power, but *necessary* and *proper* laws? This simple train of inquiry furnishes us at once with a test of the true nature of the clause complained of. It conducts us to this palpable truth, that a power to lay and collect taxes, must be a power to pass

[1] The Federalist, No. 44, pp. 211, 212.

all laws *necessary* and *proper* for the execution of that power: and what does the unfortunate and calumniated provision do, more than to declare the same truth: to wit, that the national legislature, to whom the power of laying and collecting taxes had been previously given, might, in the execution of that power, pass all laws *necessary* and *proper* to carry it into effect? I have applied these observations thus particularly to the power of taxation; because it is the most important of the authorities proposed to be conferred upon the union. But the same process will lead to the same result, in relation to all other powers declared in the constitution. . . . . But it may be asked, who is to judge of the *necessity* and *propriety* of the laws to be passed for executing the powers of the union? I answer, first, that this question arises as well and as fully upon the simple grant of those powers, as upon the declaratory clause: and I answer in the second place, that the national government, like every other, must judge, *in the first instance*, of the proper exercise of its powers; and *its constituents in the last.* If the federal government should overpass the just bounds of its authority and make a tyrannical use of its powers, the people, whose creature it is, must appeal to the standard they have formed and take such measures to redress the injury done to the constitution as the exigency may suggest and prudence justify. The propriety of a law, in a constitutional light, must always be determined by the nature of the powers upon which it is founded. Suppose, by some forced construction of its authority, (which indeed cannot easily be imagined,) the *federal legislature* should attempt to *vary the law of descent* in any state; would it not be evident, that in making such an attempt, it had exceeded its jurisdiction, and infringed upon that of the state? Suppose, again, that upon the pretence of an interference with its revenues, it should undertake to abrogate a land tax imposed by the authority of a state; would it not be equally evident, that this was an invasion of that concurrent jurisdiction in respect to this species of tax, which the con-

stitution plainly supposes to exist in the state governments?'[1]

§ 146. Final judgment upon political issues.

But this, the most important, and at the same time, the most delicate of all questions arising in our political system, is still unanswered. It is unquestionably true, as we have seen, that the jurisdiction of the federal government, and of every department thereof, is limited to certain *enumerated* objects, and leaves to the several STATES a residuary and inviolable sovereignty over *all other* objects.[2] Suppose, then, a controversy relating to the *boundary* between the two jurisdictions, state and federal. In what body or bodies resides the right of *final* decision? According to Hamilton, the PEOPLE must decide; 'and take such measures as the exigency may suggest and prudence justify.'[3] But what people? The people of the whole country? They do not now, and never did, exist in the capacity of a political body. To say, as others have said, that the constituted court or tribunal which is *ultimately* to decide upon infractions of the federal constitution, is or ought to be, established under the general government, is simply to deny that 'a residuary and inviolable sovereignty is left to the states' over *any one object* of government, and to affirm that the general government, created by the states as political communities, is or ought to be superior to its creators,—is or ought to be an *absolute* government, possessed of *the power to finally and exclusively judge of the extent of its powers, in all cases.* It is useless to argue that this does not change the principle of the case;[4] that the *decision* is to be *impartially* made, according to the rules of the constitution, and that all the usual and most effectual precautions are to be taken to secure this impartiality. The government that possesses this power, whatever be the name by which it is called, and however bound by written constitutions, cannot be a government of *limited*

[1] The Federalist, No. 33, pp. 143, 144.
[2] The Federalist, No. 39, p. 178.
[3] See above, § 145.
[4] See § 12, p. 9, *ante*.

powers, since *it has all the powers which it may adjudge to belong to itself.* Such a government, whether founded in a written or an unwritten constitution, and whether limited by the terms of its constitution or not, is, in fact, if not in theory, an unlimited, imperial and irresponsible power.[1]

It is certainly true, that there ought to be a tribunal of last resort, for the decision of questions concerning the boundary between the two jurisdictions, state and federal, in order to prevent an appeal to the sword, and a dissolution of the compact.[2] But it by no means follows that it should be a department of the federal government, or a branch of any state government. That it should be either, is in open violation of the federal principle, on which the union of the states is founded, and only on which can that union be preserved. In accordance with that principle, it should be a court of all the states, in their sovereign capacities, wherein the voice of each would be heard. Its purpose being exclusively judicial, and to settle questions of sovereignty alone, it should sit to simply pronounce its judgment. In order to avoid the excitements and dangers of special elections or appointments for the purpose, and to secure the highest judicial ability, it might consist of the ex-chief justices of the states. The mere existence of such a court, could not but exert a powerful influence to prevent or restrain usurpations or infractions of the federal constitution, whether attempted by federal or by state authorities. Its decisions, although it should lack the power to enforce them, would be sovereign determinations upon questions of sovereign right, and would furnish at least a CENTRAL THOUGHT, a beacon light for the PEOPLE at large.

Judged by the essential and fundamental principle of a

[1] It seems that the framers of the federal constitution explicitly refused to confer on the government of the union the power in question. Before they agreed upon the present clause of supremacy, it was proposed to vest in the general government a power 'to negative all laws, passed by the several states, contravening, *in the opinion of the national legislature*, the articles of union, or any treaties subsisting under the authority of the union;' and the vote upon this, by states, was three for, and seven against it. See Elliot's Debates, Vol. I, p. 207.

[2] The Federalist, No. 39, p. 178.

confederacy of states,—that the LAW of their union must express their COMMON CONSENT, and (as expounded and construed) settle and preserve the *boundary line* between the *internal sovereignty of each* and the *external sovereignty of all*,[1]—the federal constitution must be considered as essentially and radically defective, in that it provides for no such tribunal for the determination of questions concerning political infractions of the organic law of the union, and for the proposal of amendments to that law.[2]

§ 146*a*. Aggressive nature of legislative power.

'It will not be denied, that power is of an encroaching nature, and that it ought to be effectually restrained from passing the limits assigned to it. . . . Will it be sufficient to mark, with precision, the boundaries of these departments [the legislative, judicial, and executive] in the constitution of the government, and to trust to these parchment barriers against the encroaching spirit of power? This is the security which appears to have been principally relied on by the compilers of most of the American constitutions. But experience assures us, that the efficacy of the provision has been greatly overrated; and that some more adequate defence is indispensably necessary for the more feeble, against the more powerful, members of the government. The legislative department is everywhere extending the sphere of its activity, and drawing all power into its impetuous vortex.

'The founders of our republics have so much merit for the wisdom which they have displayed, that no task can be less pleasing than that of pointing out the errors into which they have fallen. A respect for truth, however, obliges us to remark, that they seem never for a moment to have turned their eyes from the danger to liberty, from the overgrown and all-grasping prerogative of an hereditary magistrate, supported and fortified by an hereditary branch of the legislative authority. They seem never to have recollected the danger from legislative usurpations,

[1] *Ante*, § 16.

[2] The power to formulate and propose amendments of the federal constitution, is of the utmost consequence. See § 87*a*, p. 147, *ante*.

which, by assembling all power in the same hands, must lead to the same tyranny as is threatened by executive usurpations. . . . In a representative republic, where the executive magistracy is carefully limited, both in the extent and the duration of its power; and where the legislative power is exercised by an assembly, which is inspired by a supposed influence over the people, with an intrepid confidence in its own strength; which is sufficiently numerous to feel all the passions which actuate a multitude; yet not so numerous as to be incapable of pursuing the objects of its passions, by means which reason prescribes; it is against the enterprising ambition of this department, that the people ought to indulge all their jealousy, and exhaust all their precautions.'[1]

'The *representatives* of the people, in a popular assembly, seem sometimes to fancy, that they are the *people themselves*, and betray strong symptoms of impatience and disgust at the least sign of opposition from any other quarter; as if the exercise of its rights, by either the executive or the judiciary, were a breach of their privilege, and an outrage to their dignity. They often appear disposed to exert an imperious control over the other departments; and as they commonly have the people on their side, they always act with such momentum as to make it very difficult for the other members of the government to maintain the balance of the constitution.'[2]

'The several departments being perfectly co-ordinate by the terms of their common commission, neither of them, it is evident, can pretend to an exclusive or superior right of settling the boundaries between their respective powers: and how are the encroachments of the stronger to be prevented, or the wrongs of the weaker to be redressed, without an appeal to the people themselves, who, as the grantors of the commission, can alone declare its true meaning, and enforce its observance?'[3]

[1] The Federalist, No. 48, pp. 228–9. Madison. The subject is fully discussed, and the dangers from the legislative power, shown by examples in our own history, in the number referred to.

[2] Id. No. 71. Hamilton. [3] Id. No. 49, p. 233.

§ 147. Cases not within the judicial power.

The jurisdiction of the supreme court of the United States, does not extend to any question concerning the powers of the federal government, the powers of the governments of the states, or the powers of the several departments of either, unless the question arises in a case at law or a case in equity, brought before the court in pursuance of the regular forms of judicial procedure; and even then, the decision of that court can affect no one but a party to the suit; a different decision may be made in the very next case in which the same question is presented. 'There may be instances of usurped power, which the forms of the constitution could never draw within the control of the judicial department. If, moreover, the decision of the judiciary be raised above the authority of the sovereign parties to the constitution, the decisions of the other departments, not carried by the forms of the constitution before the judiciary, must be equally authoritative and final as the decisions of this department. Again, there may be great and extraordinary cases, in which all the forms of the constitution may prove ineffectual against infractions dangerous to the essential rights of the parties to it: dangerous powers, not delegated, may not only be usurped and executed by the other departments, but the judicial department, also, may exercise or sanction dangerous powers beyond the grant of the constitution; and, consequently, the ultimate right of the parties to the constitution to judge whether the compact has been dangerously violated, must extend to violations by one delegated authority as well as another; by the judiciary as well as by the executive or the legislature.'[1]

[1] Madison's Report of 1799 on the Virginia Resolutions, called forth by the Alien and Sedition Laws, passed by congress in 1798. In this connection, see the Resolutions of the several states, Elliot's Debates, Vol. IV, pp. 528 to 540. See also those of the New England or Hartford Convention, assembled in 1814 upon the call of Massachusetts, Niles' Reg. Vol VII, pp. 161-269; 306. So far as these are regarded merely as the acts of state *governments*, they cannot be admitted as possessing inherent authority, for reasons formerly given. Had they been acts of Conventions of the People, chosen for the purpose, still a *constitutional major-*

§ 148. Limit of Powers.

'The plan of the convention [that is, the constitution] declares, that the power of congress, or, in other words, of the national legislature, shall extend to certain enumerated cases. This specification of particulars evidently excludes all pretension to a general legislative authority; because an affirmative grant of special powers would be absurd, as well as useless, if a general authority was intended. In like manner, the authority of the federal judicatures is declared by the constitution to comprehend certain cases particularly specified. The expression of those cases marks the precise limits, beyond which the federal courts cannot extend their jurisdiction; because the objects of their cognizance being enumerated, the specification would be nugatory, if it did not exclude all ideas of more extensive authority.'[1] The same train of reasoning of course applies with equal force to the federal executive.

The federal government, therefore, in each and in all of its departments, is clearly a government of enumerated and limited powers. Now nothing can be more absurd, than in one breath to say, that it is a government of *enumerated* and *limited* powers, and to affirm in the next, that it is, in each, in any, or in all of its departments, the *final* and *exclusive judge* of its powers. Yet some there are who boldly maintain this very contradiction; — who therefore find their 'absurdity in theory, in practice a tyranny.'

§ 149. Possible usurpations.

There may be cases of infractions of the organic law, usurpations of dangerous powers, by all the departments of the federal government combined: and yet the usurpers themselves are to be the exclusive and final judges of these infractions or usurpations! The usurpers might always find some pretext or warrant, perhaps in the constitution itself, for the assumption of such powers as they might choose to exert. Thus they might reason: — 'Why declare that things shall not be done which there is no power

*ity* of the states, *three-fourths* at least, should have concurred. They show the light, however, in which our system of governments was viewed at that early period, by some of the leading statesmen of the country.

[1] The Federalist, No. 83, pp. 381–382: *per* Hamilton.

to do? Why, for instance, should it be said, that "congress shall make no law abridging the freedom of speech or of the press," if no power is given by which restrictions may be imposed? The constitution ought not to be charged with the absurdity of providing against *the abuse* of an authority which was not given; and the provision against restraining the liberty of the press, affords a clear implication that a right to prescribe *proper regulations* concerning it was intended to be vested in the national government.'[1] It might be further urged, that one of the express objects of the constitution, was '*to promote the general welfare;*'[2] that 'the general welfare' imperatively demands some reasonable or 'necessary and proper' regulation concerning the *licentiousness* of the press. In fact, it is already argued by the *imperialists*, that 'Freedom, not license, is secured; the fair use, not the libellous abuse, is protected.'[3] The same might be urged with equal force in relation to the provision that 'congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.' Does not 'the general welfare' require, that *irreligion* should be restrained by proper regulations? And who shall decide between *freedom* and *licentiousness*, *religion* and *irreligion?* The very usurpers who might find occasion to employ these arguments! This cannot be true, so long as 'the powers not delegated to the United States by the constitution, nor prohibited by it to the states, are reserved to the states respectively, or to to the people.'[4]

§ 150. Reserved sovereignty.

At the very foundation of our system, there must be rights reserved by 'the people' of each state respecting which the federal government can have no sort of jurisdiction. Such indeed are the rights of political existence, political sovereignty, and political domain, considered as rights *internal and absolute*, inherent and inalienable, and

[1] I borrow from Alexander Hamilton. See his argument against the policy of Bills of Rights, in The Federalist, No. 84, p. 394.

[2] See Preamble to Const. U. S.

[3] Pomeroy's Const. Law, § 239.

[4] Const. U. S. Amend. Art. x.

as such *essential* to each people. But it does not follow, that the people of any one state, alone by themselves, as composing a party to the federal constitution, have a final and exclusive jurisdiction concerning infractions of that organic law. This could never be admitted in a society of equals, where—whether the society be composed of individuals or of states—each is entitled to a voice in relation to questions immediately and equally affecting all. The judgment of one is of no higher authority than that of another. All are equals in right; and among equals in right, no one can claim exclusive jurisdiction in matters of common concern. The decision of a fair majority,—or of what may be called *a naturally sufficient majority*, whatever that majority may be,—must, in all cases, be final and conclusive upon all such questions. This majority, agreeably to the federal constitution, should consist of *three-fourths of the states*—a majority at all times sufficient to change the organic law, to resume the powers of government, and remodel and revest them at will; either by the method pointed out in relation to amendments of the constitution; by a convention of the states; or by any other method which 'to them shall seem most likely to effect their safety and happiness.' This is the conclusion at which we arrive, and which, if we adhere to the principles of government founded in COMMON CONSENT,—if we desire to avoid dissensions and wars and maintain the union of the states,—will not be disputed.

§ 151. Political parties.

We have now reviewed the general nature of our political system, and the different theories concerning the same, with especial reference to the principal question, whether our union is a UNION OF STATES, or a UNION OF PEOPLE as ONE POLITICAL STATE. We have referred to the records and dwelt at some length upon the authorities and points decisive of that question; though this might have seemed entirely unnecessary, had it not been a fact that the question of late has assumed an air of paramount importance, while not a vestige of authority can be found for saying that our

union now is, or ever was, a union of our American people *as composing a single political* state.

Let us conclude this review with a few remarks concerning the *political parties*, which, from first to last, have appeared in the history of our country, and which, so long as they act in strict subordination to the fundamental principles of our constitutions, I believe to be *equally essential* to the permanence of our political system. I mean those two great parties, known originally as the NATIONALS and the FEDERALS, — though called sometimes by different names, — which appeared in the general convention of the states that framed the federal constitution,[1] and which under one name or another, have ever since existed, as the champions of UNION on the one hand, and of LIBERTY on the other.

§ 152. Origin of these parties.

One of the difficulties experienced in the general convention, 'a very important difficulty, arose from comparing the *extent of the country* to be governed, with the *kind of government* which it would be proper to establish in it.'[2] In regard to this, the convention appears to have been divided. The Nationals favored, at first, a consolidation of the states, a concentration of the sovereign powers, in one great national government, independent of the states, and dependent only on the people of the country in a national and collective capacity. This scheme, however, was but feebly supported in the outstart, and was, in the end, wholly abandoned, even by the Nationals themselves. 'It was well known, that however the citizens of the United States might with pleasure submit to the legitimate restraints of a republican constitution, they would reject with indignation the fetters of despotism. What, then, was to be done? The idea of a CONFEDERATE REPUBLIC presented itself.'[3] But though the plan of 'a convention [compact] by which several states agree to become members of a larger one,' was finally determined

[1] See *ante*, § 80, p. 101.

[2] See Wilson's speech in the ratifying convention of Pennsylvania, *ante*, § 111.

[3] Id. See also §§ 118 to 122, *ante*.

upon, the Nationals continued to labor, and to watch with vigilance every opportunity, to give a national tone and character to the new constitution. Hence the provisions of that constitution, for a representation of the people in the federal legislature, and federal legislation directly affecting the people: which provisions, though resting on the basis of a confederation of the states in their sovereign political capacities, partake somewhat of a national character, and have, in their more recent practical operation, very nearly accomplished the conversion of the states into a single state; which their opponents predicted would be their final effect, when first those provisions were introduced.

These two principal parties, which divided the general convention, and also the ratifying conventions of the several states, have since been known by various names: the Nationals even assuming, while the constitution was pending before the people for adoption, the name of their original opponents;—Hamilton and Jay, their principal leaders, contributing to The Federalist, together with Madison, as exponents, defenders and supporters of the *new federal system*;—and the Federals, with Jefferson at their head, being subsequently known, first as Republicans and then as Democrats. Thus it will sometimes happen, that a political party, for some cause or other, usually on account of some evil it has wrought, will find it expedient to adopt a new name, in order to secure the support of the conservative class; a kind of third party, peculiar to no country and as old as time, who generally hold the balance of power, and who, by rallying to the support of conservative men, aim to avoid all kinds of extremes.

§ 153. Necessity of these parties, grounded in the nature of our system.

The necessity of at least two principal parties, will appear from considering the nature of our political system: a system which, we may truly say, is founded in the nature of human society itself, in the natural relations of man to man, and the idea of securing to every individual the fullest enjoyment of his natural rights. To the very existence of human society, two things are primarily es-

sential: first, a diversity of individuals, each however possessing, in and for himself, a reason, to know; an understanding, to judge; and a will, to do, what is right or what wrong; in a word, all that is essential to individual self-government, all that makes man a morally responsible being, and all that gives him a separate and independent existence: secondly, a common principle of humanity, self-recognized in each as in one and in all the same, serving as a bond of perpetual union, and impelling all to a harmonious co-operation in the pursuit of those aims which are common to all. Our political system being founded in the nature of human society, there arise, as of course, first, a diversity of states or commonwealths, each of which is sovereign, free and self-governed under its own constitution, by its own legislature, judiciary, and executive, in all that exclusively relates to itself; secondly, a political union or association of these states, founded in a general organic law, a constitution common to all alike, under the broad and comprehensive principles of which, while each state (just as each individual of each state) remains sovereign and free in relation to its own internal and domestic concerns, a common and supreme legislature, judiciary, and executive, are called into being, with a view to the attainment of those ends which are of common and equal importance to all.

§ 154. Two equally necessary ideas.

Perhaps there is reason to hope that there is something of divine institution in this our system of things, and that on this account, it cannot be doomed to flourish for a while and then disappear, as something merely of human invention. At all events, SELF-government, on the one hand, and SOCIAL government, on the other,—LIBERTY, and UNION, both for individuals and for states,—are here the fundamental ideas. Hence the necessity of the two great parties,—the Nationals and the Federals of 1787, and the Republicans and Democrats of recent times;—the one to preserve the UNION of the states; and the other to preserve the STATES themselves, and so to prevent that UNION from wholly absorbing the states and becoming an imperial and absolute power.

It may be asked, why the necessity of *parties* to do all this? can Americans ever be blind to the equal importance of both? I answer, it is *natural* for each individual to attach himself to some one idea, and pursue it to the exclusion of all others. This, in fact, is the secret of success, no matter in what line, vocation or calling. 'An extinction of parties necessarily implies, either a universal alarm for the public safety, or an absolute extinction of liberty.'[1] It may happen at one time, that DANGER is threatened to the UNION OF THE STATES; at another, to the SOVEREIGN RIGHTS OF THE SEVERAL BODIES OF ELECTORS COMPOSING THE SEVERAL STATES. The PRESERVATION OF THE UNION, and the SECURITY OF THESE BODIES as being the STATES of which the UNION is formed, must, as is obvious, be always EQUALLY ESSENTIAL to our political system. In the language of the Supreme Court of the United States, 'The preservation of the States and the maintenance of their governments, are as much within the design and care of the Constitution, as the preservation of the Union and the maintenance of the national government; and the Constitution, in all its provisions, looks to an INDESTRUCTIBLE UNION composed of INDESTRUCTIBLE STATES.'[2] If either the one or the other shall be endangered, the people will naturally take the alarm, and turn the scales against the party that threatens the danger. This indeed is our only security—the only hope that Americans have for the perpetuity of their institutions.[3]

### (3 *h a*) OF THE RELATIONS OF THE PEOPLE AS CITIZENS.

§ 155. What is meant by *citizen*.

CITIZEN is a word of various meanings. It is often employed in the plural as equivalent to the word *people;* and this, in turn, as synonymous with *electors:* though probably at least three-fourths of our *people, citizens*

[1] The Federalist, No. 50, p. 238.
[2] Texas *v.* White, 7 Wall. 721.
[3] See *ante*, § 121.

of the states and of the United States, are wholly excluded from the rights and privileges of *electors*. All these terms are found in the federal constitution. But that constitution is not only silent concerning what character of persons is intended by either, but confers no power upon any government or any branch of any government to fix or define their duties or rights as such. The true meaning of each, however, is at once discovered, if we consider the different relations of a person to our political system. These relations are, first, his relation to a particular state and to the government of that state; secondly, his relation to the United States and to the federal government. In either or both of these relations, he may be an alien; but if not an alien, then in relation to his own particular state, he is either a member of the *civil* community, that is a *citizen* merely, or else a member not only of the civil but also of the *political* state, an *elector*; and in either case, in his character of citizen, is subject to, and entitled to the protection of, the laws of that state; so long at least as he resides therein: in relation to the United States, he is subject to, and entitled to the protection of, the federal laws, and is at the same time, a member of the *civil* community of each and every of the states; in other words, he is 'a citizen of the United States;' that is, one who is 'entitled to all the privileges and immunities of a citizen in the several states,' and is subject to the laws and entitled to the protection of the United States.

§ 156. Three kinds of states.

There are, therefore, in our system, *three* sorts or kinds of communities or states; first, *the several bodies of electors*, which (as we have seen)[1] compose the several states, in their character of several, sovereign, and independent *political* communities (however united as such by the federal constitution), and which are alone invested with *political rights* and charged with *political duties*,—being 'the people' who ordained and established our constitutions; secondly, the *several bodies of citizens*, which compose the

[1] *Ante*, § 92, *et seq.*

several states in their character of separate *civil* societies, each of which bodies is immediately subject to the government and entitled to the protection of the particular state to which it belongs, but has no voice or share in the government, state or federal; thirdly, *the common body of citizens of the United States,*—that is to say, 'the citizens of each state' *as* 'entitled to all privileges and immunities of citizens in the several states;'[1] these forming the *civil* community of the United States, being subject to the federal government and entitled to its protection, but possessing no sort of *political* power, no voice in the government of a state or of the United States, and no political duties to perform nor political rights to enjoy.

A *citizen*, then, simply as such, whether of a state or of the United States, is one who is merely a member of the *civil* community, and who, in that capacity, though subject alike to the government of his state and to the government of the United States, and therefore entitled to the protection of both, within their respective spheres, is entitled to none of the rights, and charged with none of the duties, pertaining to an elector or member of any political state.

§ 157. Naturalization.

Prior to the ratification of the present constitution of the United States, each of the states possessed and exercised the right of conferring upon whomsoever it pleased, the character and rights of citizenship; and the dissimilarity of the different systems of naturalization that thence grew up in the different states, laid the foundations of many intricate and delicate questions.[2] By virtue of this right, and of a provision contained in the articles of confederation, any one state could force upon the others, with the full enjoyment of every immunity and privilege of a citizen of the United States, any alien or class of aliens on whom it might choose to confer the rights of members of its own society; however repugnant his or their admission might be to the internal polity, convenience or wishes of

[1] Const. U. S. Art. IV. § 2.
[2] The Federalist, No. 42.

the others. To remedy the evil and inconvenience of which, when the new constitution was framed and adopted, the general supervision of the subject, the power 'to establish a uniform rule of naturalization,' throughout the several states, was confided to the federal legislature.

§ 158. Power of naturalization.

The power of congress 'to establish a uniform rule of naturalization,' is, as such, an exclusive power.[1] It is not however so all-comprehensive as to wholly exhaust the power of the people in relation to this subject. Any of the states may now, as before the adoption of the present constitution of the United States, confer upon aliens many if not all of the rights peculiar to its citizens as such. In fact, there are few of the rights or privileges of a member of the *civil* community, which are not secured, by the constitutions or statute laws of the several states, to alien friends, so long as their respective governments remain at peace with our own. Nor is this power at all concerned with the regulation of the rights and privileges of electors. Any one state, in the exercise of its own discretion, may confer the rights and privileges of electors upon any and all men alike, whether citizens or aliens; or may at pleasure exclude, from all participation in its sovereign resolutions, such as it may deem incompetent thereto, whether citizens of the state or of the United States.[2] But it can make no one a citizen or an elector of another state, or a citizen of the United States, by virtue of any mere act or volition of its own.

§ 159.

The naturalization power of congress is very precisely limited by the terms of the grant. The idea was, that the *rule*, as to naturalization, whatever it might be, should be *uniform* throughout the states; inasmuch as 'the citizens of each state were entitled to all privileges and immunities of citizens in the several states.'[3] The word *naturalization*

[1] Story on Const. § 1099; 1 Kent's Com. 428–5; 2 Wheat. 259.

[2] This is clearly an essential of its *internal sovereignty*, which from its nature cannot be ceded or aliened, or subjected to *external* control, without being wholly annihilated, or in constant danger of annihilation.

[3] See The Federalist, No. 42, pp. 197–198.

unquestionably refers to *aliens*, that is, to foreign-born subjects. It therefore appears that the only power which congress has concerning citizenship, is confined to the removal of the disabilities of foreign birth.[1] The power to naturalize an alien, is the power to confer upon him the character of a *citizen*, with the rights and privileges incident thereto. The power to enact '*a uniform rule* of naturalization,' is another thing. The power to define the character, and to determine the rights and privileges of citizens, is a power of a still different nature, and the exercise of which is confided neither to congress nor to any department of the federal government. Congress can make no law establishing any criterion of citizenship, or prescribing the rights or privileges that a man shall enjoy in virtue of that character. Congress can only provide '*a uniform rule*' in virtue of which the subjects of foreign states may come to be invested with *the character and rights of citizenship*, as determined by the laws of the respective states.

§ 160. Character of the power.

It ought to be particularly noticed, that the power *to confer* the character and capacity, or the rights and privileges of citizenship, is nowhere given to congress: the power '*to establish a uniform rule* of naturalization,' under which *rule* the character and rights of citizenship may be conferred by the courts, is another and a different power. The language of the constitution is, 'to establish an uniform rule of naturalization and uniform laws on the subject of bankruptcies throughout the United States.' The power is therefore completely exhausted when once that *uniform rule*, in the one case, and those *uniform laws*, in the other, have been established. If congress can, in pursuance of this grant of authority, declare a certain description or class of persons *citizens* of the United States, invested with all privileges and immunities of citizens in the several states, by a mere declaratory act, and without es-

[1] *Per* Justice Curtis, 19 How. U. S. R. 393, citing The Federalist, No. 42; 12 Wheat. 259, 269; 3 Wash. 313, 322; 12 Wheat. 277; 3 Story on Const. 1-3; Rawle on Const. 84-88. 1 Tucker's Blackst. App. 255, 259.

tablishing *a uniform rule* of naturalization in accordance with which all aliens alike may be admitted to citizenship,—as it has in one instance at least assumed to do;[1]—it also can, and with equal propriety, declare a certain description or class of persons *bankrupts*, by a mere declaratory act, and without establishing *uniform laws* on the subject of bankruptcies. The power is one and the same in nature and character, whether applied to the subject of naturalization, or to the subject of bankruptcies: that is to say, it is a *legislative*, and not a judicial or executive power. And if, by a mere declaratory act, a particular class may be declared citizens, another class may be declared aliens. So, too, any particular person may be declared a citizen, or declared an alien, at the pleasure of the federal legislature. If, moreover, congress may, by a bill of rights, or by any declaratory act, proceed to determine and declare the rights and privileges of citizens, it may also fix the character and *status* of aliens. It may, in fine, control the right of suffrage, and so dispose of the paramount sovereignty, and the inherent and inalienable prerogatives of the sovereign, to whomsoever it pleases, and in any way agreeable to its humor and caprice. The power is one of the highest sovereignty, and no limit can be set to the will of that body in which it is reposed. Congress is certainly not *that* body. It is therefore not for congress to say or declare, *who are citizens*, or *who are aliens;* or what are the rights or privileges of either.

§ 161. Citizens of the United States

By one of the original articles of confederation, it was provided that, 'The better to secure and perpetuate mutual friendship and intercourse among the people of the different states, in this union, the free inhabitants of each of these states, paupers, vagabonds, and fugitives from justice excepted, shall be entitled to all privileges and im-

[1] Act of 10th February, 1855, §§ 1, 2; 10 Stat. 604; Bright. Laws of U. S. 182. This Act was supposed to enable foreign-born children of United States citizens to inherit the estates of their parents, in this country. I imagine that *the laws of inheritance*, in the several states, were in no way affected by it.

munities of free citizens in the several states; and the people of each state shall have free ingress and regress to and from any state, and shall enjoy therein all the privileges of trade and commerce, subject to the same duties, impositions, and restrictions as the inhabitants thereof respectively, provided that such restrictions shall not extend so far as to prevent the removal of property imported into any state, to any other state of which the owner is an inhabitant.'[1] The substance of this was afterward copied into the present constitution of the union; which, as we have also seen, provides that 'The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states.'[2] Hence has arisen what is termed 'citizenship of the United States:' which, however, signifies nothing but the right of a citizen of any one state to be deemed a member of the civil community of any other state into which he shall actually remove. For as to subjection to the federal constitution and to the laws made in pursuance thereof, and the right of protection resulting therefrom, these would have followed as of course, independently of any such provision. A citizen of the United States, is therefore one, who, being a citizen of some particular state, is, by virtue of this clause of the federal constitution, 'entitled to all privileges and immunities of a citizen in the several states.' Without being or becoming a citizen of some particular state, no one, as is obvious, can reap the benefits of this provision; or, in other words, be entitled to the privileges and immunities of *a citizen in the several states—i. e., of a citizen of the United States.*

§ 162. Origin of U. S. citizenship.

It has been said, that by the articles of confederation, 'there is no *status* of United States citizenship created or recognized; we have free inhabitants and citizens of the respective states, but no citizen of the United States.'[3] But that is a great mistake. If it be true, the members

[1] Art. Conf. IV.
[2] Const. U. S. Art. 4, § 2.
[3] Pomeroy's Const. Law, § 67.

of the first three or four congresses were ineligible to their seats. For, by the constitution, no one can be a member of the house of representatives who has not 'been *seven years* a citizen of the United States;' and no one can be a senator who has not 'been *nine years* a citizen of the United States.'[1] These provisions, however, were not regarded in the cases of the first negro congressmen, who became citizens by the fourteenth amendment.[2] It was by the constitution required that the President should be 'a natural-born citizen, or a citizen of the United States at the time of the adoption of this constitution.'[3] Thus the phrase, 'citizen of the United States,' is employed three times in the federal constitution, as a qualification for office under it, and is found no oftener and in no other connection, except in the recent amendments. In fact, citizenship of the United States was originally established by the fourth of the articles of confederation; substantially condensed into the second section of the fourth article of the present constitution, as stated above; and the 'privileges and immunities of citizens in the several states' to which it referred, were, originally, and have ever been, precisely the same as now. As we have often remarked, no new society or community, civil or political, was established, recognized, or authorized, by the new constitution.

§ 163. 'Privileges and immunities' of U. S. citizenship.

The expression in the federal constitution, 'all privileges and immunities of citizens in the several states,' has always been construed to mean, such rights and privileges as are in their nature fundamental, such as belong of right to the citizens of all free governments, such as have at all times been enjoyed by the citizens of the several states from the time of their becoming free, sovereign and independent;[4] and has been held to be applicable only to natu-

[1] Const. U. S. Art. I, §§ 1, 2.

[2] I take the amendment to be a recognition of the law as laid down in the case of Dred Scott, in 19 How. U. S. Rep. For if negroes were citizens of the United States before the amendment, the amendment itself was without purpose or effect.

[3] Art. II, § 1.

[4] 4 Wash. C. C. R. 380, 381.

ral born citizens, and aliens duly naturalized under the acts of congress, and to mean that if they remove from one state to another, they shall be entitled to such rights and privileges as persons of the same description are entitled to in the state to which such removal is made, and to no other rights or privileges.[1] It cannot therefore escape attention, that citizenship of the United States,—*i. e.* the *right* of a citizen of a state to the 'privileges and immunities' of a citizen in the several states, or as practically and legally understood, the right of a citizen of any one state to the privileges and immunities of a citizen of any other state into which he shall actually remove,—is merely an appendage or addition to the citizenship of each particular state. The latter is the original, independent and substantial character, upon which the former is engrafted. The former cannot exist independently of, cannot precede, but can only follow, attach to and rest upon, the latter.

Some have supposed, that one of the rights, 'privileges or immunities' of a citizen of the United States, is that of *voting* at public elections. Nothing can be further from the truth. It is only by virtue of provisions contained in the constitution of each particular state, that a citizen of the state or of the United States can ever be a member of its political community, or ever be invested with any political rights. Nor is it in the character, name or capacity of a citizen of the United States, that any political rights or powers are ever enjoyed; but only in the character or capacity of an *elector,* that is (as we have seen) of a member of the *political* body or state; which character or capacity is never conferred upon any but one who has first been admitted a citizen of the state wherein he resides.[2]

[1] 2 Kent's Com. 71. See 19 How. U. S. R. 405.

[2] I have elsewhere shown the baselessness of the *imperial* theory. In this connection, however, it may not be improper to notice the admissions of its ablest exponent, the learned 'professor of political science in the University of New York.' Speaking of the federal constitution, he says:—'It nowhere attempts to define what persons may exercise the right of suffrage, nor does it confer upon the general government any such power. In the only instance where provision is made for a popular

§ 164. The XIVth and XVth amendments.

What, then, is the meaning or effect of the *fifteenth* amendment to the federal constitution?—'The right of *citizens of the United States* to vote, shall not be denied or abridged by the United States, or by any State, on account of race, color, or previous condition of servitude.' This is generally understood to mean, that citizens of the United States shall not be denied the right to vote, or that the right to vote shall not be denied to citizens of the United States, nor shall the right be abridged, by the United States or by any state, *on account of race, color*, etc.

The amendment unquestionably presupposes, as the basis and possibility of its obligation, that a right or power somewhere exists, other than that of any state, by which the right of suffrage, the essential sovereignty of 'the people' of a state, may be controlled without their consent.

election, the states are left to designate the individuals who may unite in electing. *This fact is a complete answer to the somewhat common notion that United States citizenship implies the right of voting. Nothing can be further from the truth. Not a vote is cast, from one end of the country to the other, by any person in virtue merely of his being a citizen of the United States.* The constitution recognizes the *status* of citizenship, and provides for admitting foreigners to that condition; but *it does not create any class of voters. What the several states may do in this respect, is a matter entirely for their own consideration.* . . . A state may deny to some citizens the right of suffrage entirely, as most do to the free negro, and all do to women and minors; or may deny it to persons of foreign birth for a certain period after naturalization, as does New York. Others still may confer the privilege upon persons who are not citizens of the United States, as do a few of the Western states. It is plain, therefore, that mere citizenship of the United States does not involve the right of suffrage. *It is also plain that the United States have no power or authority to interfere with the discretion of the states in determining what class of persons possess the "qualifications" for electors.* Pomeroy's Constitutional Law, §§ 207, 209. The propositions which I have given in *italics*, are of themselves a complete refutation of the *imperial* theory—that the paramount sovereignty, the supreme political power, resides in the people of the United States *as composing a single community*, and *not as the several bodies of electors composing the several states.* It is certainly strange that a theory so utterly baseless, and at the same time so destructive of the states which are the pillars of the union, and by consequence destructive of the union itself, should have ever been conceived as something in which our people should be schooled.

In this, the amendment is simply subversive of the sovereignty of 'the people,' which has always existed, and could only exist in a union of republican states, as the supreme and uncontrollable right of each body of *electors* to say who should or should not be admitted to participation in their sovereign resolutions. No matter what view is taken of the amendment, the all-important objection that it takes from 'the people' of each state the peculiar essential of their internal right of self-government, must remain an unanswerable one. In addition to this, the meaning (perhaps the conversion of the states into a single state) is hidden under a very unusual and ambiguous form of expression—'the right of *citizens of the United States* to vote.' In this connection, it is peculiarly important to recollect, who were 'citizens of the United States,' and in whom 'the right to vote' was vested, prior to this amendment.

§ 165. There are in our system, and have ever been, as we have formerly seen, *three* sorts or kinds of communities or states: first, THE SEVERAL BODIES OF ELECTORS, which are THE SEVERAL STATES themselves, considered as several, sovereign, and independent *political* communities, and which (each as 'THE PEOPLE' of a state, invested with the character, capacities and qualifications of ELECTORS or VOTERS by virtue of their own organic law, and acting as a sovereign body or state) originally and severally formed our several state constitutions, and separately and severally 'assented to, ratified,' and so 'ordained and established' our federal constitution: secondly, THE SEVERAL BODIES OF CITIZENS, which are the several states as separate *civil* communities, each of which bodies is immediately subject to the government and entitled to the protection of the political state to which it belongs, but has no voice or share in the government, state or federal: thirdly, THE WHOLE BODY OF CITIZENS OF THE UNITED STATES, this body being the *civil* community of the United States, made up of 'the citizens of each state' as 'entitled to all privileges and immunities of citizens in the several states,' and being subject to the federal government, and entitled to its protection, within the

sphere of its constitutional action, but possessing no sort of *political* power, no voice in the government of a state or of the United States, and having no *political* duties to perform, and no *political* rights to enjoy. By the *fourteenth* amendment, 'All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States.' '*All persons*,' men, women, and children, of all races, colors, sexes, and conditions. Now, no one ever imagined that *these* had a right 'to vote.' Yet the new amendment says, 'the right *of citizens of the United States* to vote, shall not be *denied*, or abridged,' etc. Read it as we will, *one* of *two* grounds must be taken; *either* that the amendment confers a WHOLLY NEW RIGHT, a 'right to vote,' upon 'citizens of the United States,' as such;—in which case, *any* and *every* citizen of the United States, of whatever color or race, and whether male or female, of age or non-age, tax-payer, pauper, or convict-felon, is newly clothed with a 'right to vote,' which 'shall not be denied or abridged on account of race, color, or previous condition of servitude,—*or* the negative ground must be taken, that the amendment confers *no* right to vote; that it merely *prohibits* the United States and every of the states, from denying or abridging that right to vote which was *previously* vested in each body of electors by their state constitution, 'on account of race, color,' etc.

If by *any* construction or interpretation,—it matters not what it may be,—the effect of this amendment is to *confer* a right upon 'citizens of the United States to vote,' a right which *previously* did not exist, such right 'to vote' is A WHOLLY NEW RIGHT: it is 'the right of *all persons* born or naturalized in the United States, and subject to the jurisdiction thereof, to vote;' not the right to vote which was *previously* vested by each state constitution in the *electors* of the state; and as this *new* right is derived from the constitution of the United States, and not limited, qualified, or restricted thereby, it follows as of course, that as the common, equal and universal right of the new body of electors, composed of 'all persons born or naturalized § 166.

within the jurisdiction of the United States,' it cannot be limited, denied or abridged, unless in view and pursuance of the new amendment by which created; 'anything in the constitution or laws of any state to the contrary notwithstanding.'

It was formerly observed, that by many if not all of the state constitutions, citizens of the United States, being *otherwise qualified as required by those constitutions*, are admitted to the body of electors in each state; not indeed by *federal* but by *state* authority; and not as a matter of duty to admit or of right to be admitted, but of grace merely; and not in the character or capacity of citizens of the United States, but in the character and capacity of *persons possessing the requisite qualifications*.[1] But if the amendment refers to these, it does not invest any man with any *new* right; it merely *prohibits* the states and the United States from denying or abridging their vested right by *future* restrictions 'on account of race, color,' etc.

The question, be it observed, is not of 'negro-voting,' but of voting by authority of the FEDERAL instead of the STATE constitution, of holding to THE UNION OF THE STATES as such, or of merging them all into A SINGLE STATE (as will be presently seen).

§ 167. But why, it may be asked, PROHIBIT *the United States* from denying or abridging the right on account of race, color, etc.? Not a shadow of power had ever passed to them, or to any department of the federal government, to deny, abridge, or in any way affect, the right to vote. The implication, if any be allowable as effecting an alienation of the essential and inalienable sovereignty of 'the people' of a state, is, that the United States *now* may, by further and new provisions, deny or abridge the right on *any other* account: if by their representatives, then that *congress* may deny or abridge the right on any other account; as for instance, on account of previous connection with a particular political party or movement. The implication is the same in relation to any state. Not that any state may *now* deny

[1] See *ante*, § 163 in note.

or abridge the right by virtue of provisions of its constitution *previously* existing. For if any *new* right to vote results (which is the only thing in question), it is given to all such 'citizens of the United States' as did not and could not (as well as to those who could and did) possess a right to vote by that constitution; A NEW POLITICAL COMMUNITY is created and established, whose right to wield the paramount sovereignty is everywhere the same, determined and prescribed, not as heretofore the right of 'the people' of the state has been, but by the general constitution of all: and the right of this *new* body cannot be limited by reference to that which did not create it, except by new provisions in view and pursuance of the implied permission, since only thus can the right be limited by a *different* authority *extraneous* to the grant. Perhaps it is asked, what would be the difference between new amendments of the state constitutions in view and pursuance of the implied permission to deny or abridge the right on any other account, and existing provisions of those constitutions affecting the right? The difference would be great; that while the former would, the latter could not, *designedly* affect the right: the existing provisions, if construed to affect the *new* right, would be construed to affect an object, and to effect a purpose, which they never could have contemplated, and to which they originally were and yet are strangers. Such a construction would negative the first principles of construction. The decision of this point, however, be the decision what it may, cannot affect the position, that if any right to vote results from the new amendment, which was not previously vested by the state constitutions, A NEW POLITICAL COMMUNITY IS CREATED. This deserves our special attention.

§ 168. The United States changed into one single State.

Prior to this amendment, 'the right to vote,' including the right to be elected to public office, was exclusively vested in the several bodies of electors composing the several states and being the only *political* communities or states—the members of each body of electors deriving their rights as such from *their own peculiar law*, and not

from any authority extraneous to their own constitution or sovereign will; and whatever of public or political authority, state or federal, had ever been exercised, from the beginning of the Revolution to the ratification of the amendment, had been exclusively derived from (as delegated by) these several bodies of electors; each body acting as a sovereign and independent political community or state. (This is a truth of our history, which, as we have formerly had occasion to show, challenges all attempts at contradiction or qualification.) Of these, there were originally *thirteen;* and prior to the amendment, *thirty-seven.* The UNION was a UNION OF STATES, as its name imports, and not a United STATE.

But assuming that the power of amendment is *unlimited* (for this is implied by every amendment affecting the paramount sovereignty), and that a 'right to vote' results from the amendment and is vested in 'citizens of the United States' by *federal* authority, all is changed: we have but ONE POLITICAL STATE; our union is a union of 'citizens of the United States' as co-equal members of a single confederacy of *individuals;* and the *States,* and '*The United States,*' in all but the forms of administering government, are things of the past. The *forms* of state and federal government, are still preserved; but these, though essential to the very existence of the several bodies of electors, or political states, in the old system, are in no degree essential to the *new* political state into which those bodies now are merged, and cannot long survive the dissolution of the sovereignties in which they were founded. In the *old* system, 'the right to vote' was as *manifold* as the bodies of electors composing the states. Now it is *one,* to be enjoyed by the WHOLE BODY of 'citizens of the United States,' in common and without distinction. Speak of the election by 'the people' of Massachusetts, New York, or any other state; there is no longer any such 'people;' we have only THE ONE GRAND BODY OF ELECTORS, 'the citizens of the United States,' and these electors, as happening to be here or there, in this state or that, now perform the sovereign office of such as were formerly the electors composing the

political state, but which political state no longer exists, unless as a mere election division.

Not only the CONSTITUTIONS of the states, but the STATES themselves, are ABOLISHED. Is this denied? Then the fact that the fifteenth amendment confers upon any a right to vote, is also denied. Either we vote, as heretofore, by STATE authority, that is, by authority of the SOVEREIGN WILL of the PEOPLE OF EACH STATE, expressed in their state constitution; or else we vote by FEDERAL authority, that is, by authority of the SOVEREIGN WILL of the PEOPLE OF THE UNITED STATES AS ONE PEOPLE AND ONE STATE, expressed in the new amendment. There is no *third* ground. A man cannot VOTE by virtue of TWO sovereign wills in any ONE state: however it may have been assumed by officers of state elections, that such a thing could be done.[1] Suppose, then, we vote by FEDERAL authority. Now the AUTHORITY by which we vote, is naturally and necessarily, the PARAMOUNT SOVEREIGNTY. The paramount sovereignty, then, which formerly resided in 'the people' of each state, is now transferred to 'the people' of the United States, to the 'citizens of the United States,' which, it is assumed, have a right to vote by force of the fifteenth amendment, and which, by the fourteenth, are declared to be, 'all persons born or naturalized in the United States and subject to the jurisdiction thereof.' The SOVEREIGNTY is no longer manifold, as was the sovereignty of the people of the states; it is ONE; and if there is only ONE SOVEREIGNTY, there is, of course, only ONE STATE; and the citizens thereof are co-equal members, civilly andpolitically, of one and the same community. There are NO UNITED STATES, because there are NO STATES. Are the constitutions of the several states, or those which formerly were known as such, supreme laws within their spheres? How and by what

[1] I have no doubt that the officers of elections held under the laws of a state, who admit a vote that the state constitution excludes, or a vote that is illegal by the laws of the state, are liable to conviction of, and punishment for, the offence, by the courts of the state. Nothing can be clearer than the proposition, that the right to vote cannot be exercised by virtue of two sovereign authorities.

authority are they *now* of any obligatory force? By authority of the ONE INDIVISIBLE SOVEREIGNTY OF THE ONE INDIVISIBLE POLITICAL STATE; not by authority of 'the people' of each state; and BECAUSE THEY ARE ADOPTED, IN SO FAR AS PRESERVED, BY THAT ONE SOVEREINTY; not because they severally express the sovereign wills of the people of the states.

§ 169. The change produced by the new amendment, if any whatever is effected by it, is radical and complete. It is neither more nor less than an absolute transfer of the essential sovereignty of each body of electors, *an alienation of the inalienable right of self-government inherent in 'the people' of each state*, to the *new political* (formerly the *civil*) community or state, composed of 'citizens of the United states;' that is, as we have seen, of '*all persons* born or naturalized in the United States and subject to the jurisdiction thereof;' and this accomplishes the total destruction of the states as separate and independent political communities, and rears upon their ruins—'THE EMPIRE.' Upon any construction of the new amendment, which results in 'the right of citizens of the United States to vote,' there is no possible escape from the conclusion reached. For if the right is given to any by virtue of the amendment, it is given to all; and if any limitation, not amounting to an absolute denial of the right, is or may be established, such limitation cannot amount to a total exclusion, and those not excluded will constitute the *new* political state. And thus, if any effect is given to the new amendment by way of establishing a right to vote which did not previously exist, it must be admitted that it creates *a wholly new political community;* just as the fourteenth had, to the extent not only of four millions of population but of the whole population, created a *new civil* community, or new community of citizens as such. This I believe has been overlooked. Behold, then (in the work and the triumph of a *political party*), the destruction and 'reconstruction' of the states! the establishment of 'the empire'! and, what! THE BLINDNESS OF 'THE PEOPLE' TO THE RUIN THUS WROUGHT!!!

The conclusion reached can only be avoided by assuming the negative ground; that the new amendment *does not confer* 'the right to vote' upon any who did not *previously* possess it in virtue of some state constitution; but simply *prohibits* the denial or abridgment of such right as was *previously vested*, 'on account of race, color, or previous condition of servitude.' Thus, in states which had previously conferred the right without regard to race, color, or previous condition of servitude, the prohibition prevents any future distinction on account of race, color, etc.; while in states which had previously limited the right to a particular race, color, or condition, the prohibition only applies to *future* restrictions on these accounts, and works no present or immediate change in their constitutions. Otherwise, qualifications as to age, sex, etc., would have been required by the amendment: for the right, if limited at all, must be limited by, or in pursuance of, the grant, and not by a prior, different, and extraneous act, which had and has no relation thereto. This construction, we may add, is strictly in accordance with the construction of other prohibitions contained in our constitutions: such, for instance, as that 'the right of the people to keep and bear arms shall not be infringed.'[1] Here, and in all the like cases, no one has ever supposed that the right was originally created or extended, or newly conferred or vested; all have agreed that the right was recognized as a right established by the law of each state, and as one to be guarded against *future* infractions. § 170.

Had the amendment been designed to *newly invest* the citizens of the United States with a right to vote, such as they had not previously and could not have under the state constitutions, the language would probably have comported with the purpose in view: as where it was originally designed to invest the citizens of each state with the character of citizens of the United States, it was provided that 'the citizens of each state *shall be entitled* to all privileges and immunities of citizens in the several states;'[2] so here

[1] Const. U. S. Amend. Art. 2.

[2] Const. U. S. Art. IV, § 2; Art. Confed. IV.

the language would probably have been that 'citizens of the United States *shall be entitled* to the rights and privileges of voters (or electors) in the several states;' and if any limitation or qualification had been intended, that would also have been expressed; and the prohibition as to infractions of the right, would then have followed. This would have opened the eyes of 'the people' to what was designed.

§ 171. There are TWO, and only two sources from which the right 'TO VOTE' can be derived; STATE, and FEDERAL. If derived from the STATE, it is the right which was *previously* vested by the state constitution, and is exercised solely in virtue of state authority, as heretofore: if derived through any construction, operation or effect, of the new amendment, it is a wholly new right, a right to be exercised solely in virtue of FEDERAL authority; and all the consequences formerly stated, must be accepted.

The amendment concludes in these words:—'Congress shall have power to enforce this article by appropriate legislation.' If, therefore, any new right is vested, it is the right of equal and universal suffrage, the right of a wholly new political community,—in the language of the amendment, 'the right *of citizens of the United States* to vote',—and the *entire control* of this *new* right, involving, as we have seen, the paramount sovereignty of 'the people,' is forever ceded, aliened and abandoned by them, and vested in their now sovereign rulers, the federal congress. The fundamental principle of our political constitutions, 'All power is inherent in the people,' must hence be understood to mean, 'All power is vested in Congress.'

§ 172. But we cannot assent to the conclusion that any *new* power is vested in congress: for congress had always the power to enforce every article of the federal constitution 'by appropriate legislation;' and still has such power, unless by this express and specific delegation of power, in the new amendment, the power to enforce other articles by *appropriate* legislation is impliedly withdrawn. Nor can

we adopt the construction of the new amendment that gives to citizens of the United States a right to vote which they previously had not; consequently resolves the states into a single state, and overturns the fundamental principles of our political system: because, first, it cannot be supposed that any such effect was designed; secondly, no alienation of the inalienable right of 'the people' of each state to govern themselves in matters peculiarly and immediately affecting themselves, no alienation of the supreme control of the right of suffrage, however formal or solemn the deed assuming to effect such alienation, could for a moment be valid or binding;[1] thirdly and lastly, any construction of the federal constitution, or of any provision therein, which merges the several political communities of which the union is composed, into a single political community or state, would render the whole constitution inapplicable to our then political condition. That constitution was never formed *by* any single political state, nor *for* any single political state; as we have seen, it was formed *by* the states, and *for* a union of states; in the language of its preamble, '*for* the United *States* of America;' and its whole operation is based upon the existence of the states, and the action of the states, as several, sovereign, and independent political communities.[2]

§ 178. We have now examined, at considerable length, THE LEGISLATIVE POWER OF THE PEOPLE, and also the SOVEREIGN ENACTMENTS by which it is evidenced: we have searched the RECORDS themselves, and observed the METHOD of proceedure; we have traced the ACTS of sovereign power to the SOVEREIGN himself, and found him, finally, in the character of the *elector* as a co-equal member of the political state.

Let us in conclusion of this subject be reminded, by one of our ablest jurists and statesmen, of the one grand object of those sovereign enactments. 'The chief if not the only object of written constitutions, is to limit the powers of

[1] See *ante*, § 87 *a*, *et seq.* and § 135 and note.
[2] See Texas *v.* White, 7 Wall. 721.

government, whether they are to be exercised by the few or the many, and it is only by such means that the people can be assured against the encroachments of power. "Eternal vigilance is the price of liberty," in any form of government, so prone is power to advance beyond, rather than to recede within, its just limits. Resistance and bloodshed designed to rebuke and restrain it, have crimsoned the pages of history for ages; but it is to modern civilization the boast belongs of a remedy, in the limitations of constitutions and charters. But these limitations to be effectual, must be enforced. Neither times nor circumstances should claim exemption from such limitations. The more tubulent the times, or pressing the circumstances, the more need there is of adhering to these. When peace reigns, an enlightened people need to realize but little the fact of government. The time when most it is to be valued and venerated, is when commotion, excitement, peril and war exist, it is justly administered in accordance with its constitutional limitations. If we have emerged from such a condition and passed the ordeal with but little to condemn as infractions of the constitutions of our country, we have indeed great occasion to rejoice. IF, ON THE CONTRARY, THEIR SAFEGUARDS HAVE BEEN WEAKENED OR OVERTHROWN, IT SHOULD BE KNOWN, AND THE INJURY REPAIRED AS SPEEDILY AS POSSIBLE.'[1]

§ 180. Duties and rights of *citizens* as such.

ALLEGIANCE, as we formerly had occasion to remark, when speaking of the principles established by the Revolution,[2] is the tie, or obligation, which binds the citizen to the political state, in return for that protection which the state affords to him. The duty of obedience, and the right of protection, are strictly correlative. The relation in which they arise, is that of the sovereign to his people, citizens or subjects. Now as allegiance can only be due to the sovereign; and as, in this country, we have many sovereigns, namely, the several bodies of electors composing the several states; it follows as of course that alle-

[1] *Per* Thompson, Justice, 50 Penn. St. 167-168.
[2] *Ante*, § 55.

giance can only be due to these several bodies of electors.[1] 'All power is inherent in the people;' that is, the people, in their capacity of electors, are the sovereign. But the people being, in their capacity of electors, not one, but several bodies, the allegiance of the citizen is due to the sovereign wills of these several bodies, as expressed in their state constitutions, and to the sovereign wills of all concurrent in one, as expressed in their federal constitution. His allegiance is due, then, not only to his particular state, but also to the United States. Citizens of the United States are therefore said to be subject to a two-fold allegiance.

§ 181. Two-fold character of allegiance.

This two-fold allegiance was the subject of serious debate in some of the conventions of the states, pending the adoption of the federal constitution. The objections made by some, to having *two sovereigns* over *one* and the *same* subject, were answered by arguments referring to the *boundary line* between their respective jurisdictions, and showing the improbability of their ever conflicting one with another. That the federal constitution should be brought into conflict with the constitution of any one state, was never designed either by its framers, or by the several bodies of electors by whom it was adopted. *Two constitutions* and *two governments* for *each state*, were designed and established; not the one over the other, but each within the sphere of operation peculiarly marked out and appropriated for it. The two constitutions, in relation to each state, proceed from one and the same original fountain of organic law; namely, the *electors* of each state, not the people of the United States as a single political body; for in the capacity of a single political body, the people of the United States have never yet acted or even existed. We have seen that the ratification of the federal constitution by the conventions of any *nine* of the original *thirteen* states, was, according to the last article of that in-

[1] If indeed it were due to the people in their natural capacity, then, by consequence, it were due to humanity in general; not to any particular state, but to all mankind.

strument, to be sufficient for the establishment thereof as *between the states* so ratifying the same.[1] We have also seen that the ratification of that instrument was the work of an independent and sovereign *convention of the electors of each state.* Thus each body of electors, as a sovereign and independent political community, established not only their own constitution, but also, *in so far as it related to them*, the constitution of the United States: the *two constitutions, in relation to them*, resting solely in their sovereign authority, and *forming a single organic law;* establishing, indeed, *a single government, internally* administered according to their *state constitution*, by officers chosen by them for that purpose, and distinguished as officers of the state; *externally* administered, in relation to the other states and to foreign governments, according to the *federal constitution*, by officers chosen in like manner for the purposes of the federal union, and distinguished as officers of the United States.[2] Allegiance is therefore due to both the state and federal governments, in one and the same and consequently in an equal degree. It is impossible to conceive that the action of the people or electors of a state, could be of higher solemnity or of greater obligation in the ratification of the federal constitution, than in the enactment of their state constitution.[3] Proceeding from one and the same original source and fountain of power, they must of necessity be of equal obligation; and with respect to that source, must be one and the same supreme law, however different and distinct in relation to the governments they establish.[4] Upon no other principle indeed could allegiance have ever been due to both, than that of the supremacy

[1] Const. U. S. Art. VII.

[2] We have the authority of Hamilton for the proposition, that we ought to 'consider the state governments and the national government, as they truly are, in the light of kindred systems, and as parts of ONE WHOLE.' The Federalist, No. 82, pp. 378 and 379.

[3] As to the *supremacy* clause in the constitution of the United States, see *ante*, § 143, *et seq.*

[4] It will be observed, that here I speak of the action of the people of each state *as it relates to themselves. As it relates to themselves*, it follows of course, that the powers of government may be resumed by

of each within its appropriate sphere, and the division and separation of the spheres wherein they should severally act. Within the limits of those powers which are delegated to each by its own fundamental and organic law, unqualified obedience is due to both;[1] but beyond those limits, obedience is not due. On either hand, the terms of the compact determine the extent of the obligation. The right of protection, corresponding to this duty of obedience, is therefore none other than the right of the citizen to a faithful and impartial administration of the law; and this is a right that may be legally enforced against any officer who fails in the fulfilment of his trust, and against any private individual who neglects the performance of his duty.

§ 182. Obligation of human laws.

It is not to be questioned, that all our laws, without distinction, so far as pursuant to our political constitutions, are of absolute authority and supreme obligation; binding alike upon the private judgments and consciences of all individuals, in relation to things of equal importance to all. Human laws, it is sometimes said, if inconsistent with the law of nature or the law of God, impose no duty and confer no right; for then the first and highest duty of all, is to disobey them. This in terms is strictly true. The argument, however, often made by bigoted minds, assuming a clear and certain perception and a perfect understanding of those primary laws, and a known disregard of the duties they enjoin in the framing and enacting of the civil or political laws, is exceedingly erroneous, and also of wicked and mischievous tendency. For many who perceive not its error, proceed to the doctrine that the private conscience of the individual, is, for him, the ultimate criterion of right and wrong, not merely in matters peculiarly relating to himself, but also in his social, civil, and political relations; wherein his equals in right are equally

them. But the powers of the federal government, being founded in *compact* with the other states, and not in the sole action of any single state, those powers may not be resumed unless by the action of a majority of the states. See *ante*, § 137.

[1] See 2 Kent's Com. 44.

concerned. Laws enacted and sanctioned by the people themselves, cannot but express the religion and philosophy, the enlightened conscience and the common sense, of the whole body; to which the religion and philosophy, the private conscience and private judgment, of each individual or member of that body, is bound to conform; at least in matters wherein his equals are equally entitled to be heard. Upon a different principle, no civil or political state can exist. Peace and war are the only alternatives; the one or the other of which, we are bound to accept. If peace be preferred, the sovereign mind and will of the people, whatever the law thereby prescribed, must be respected by all as of absolute and unlimited obligation; as being, in the strictest sense, *supreme;* supreme in reason, supreme in wisdom, supreme in right: there being no other criterion of what is reasonable, just and right, sanctioned as such by all, than this expression of the religion and philosophy of all. Such is the just and reasonable ground of the obligation which equally binds every member of society to implicitly obey the laws of the civil and political state to which he belongs. He is not bound to obey them because *he* thinks them reasonable and just: nor is he excusable for disobeying them because *his* conscience declares them unrighteous and unjust.

§ 188. OF THE RIGHT OF EXPATRIATION; by which is meant, the right of a citizen to dissolve his political connection with the state of which he is a member, and attach himself to a foreign government. Though the rules of our law as to the naturalization of aliens, by an oath adjuring their old allegiance and invoking the protection of a new one, would seem to virtually imply that our citizens may, if they wish, transfer their allegiance to a foreign power, by the same or similar means; yet the generally prevailing opinion has been that they cannot lawfully so do by any mere act of their own, and without the express permission both of the State and of the United States.[1] It has, however, sometimes been assumed that expatriation is a natural and

[1] See 2 Kent's Com. 44 to 49.

fundamental right, and that the principles maintained and the practice adopted by the state and federal governments, are sufficient evidence of its recognition.[1] By the constitutions of many of the states, the right of immigration from one state to another, is declared to be a natural and inherent right.

§ 184. By the law of nations, according to Vattel, a man may have a right to quit his country, and attach himself to a foreign state, in the following cases at least. 1. If he cannot procure subsistence for himself and his family without so doing. 2. If an intolerant party obtain control of the government, and enact tyrannical and unconstitutional laws.[2] Painful alternative to which a citizen may be driven by acts of intolerance and oppression! But it is hardly supposable that either of these cases can ever occur in this country,—a country of such vast extent, variety and resources, as may never fail to supply the means of life to all, and where written constitutions, so long as the people are just to themselves, must ever form an insuperable barrier to arbitrary power.

The right of expatriation is now fully and positively established by an act of congress in these words:—'Whereas the right of expatriation is a natural and inherent right of the people, indispensable to the enjoyment of the rights of life, liberty, and the pursuit of happiness; and whereas, in the recognition of this principle, this government has frequently received emigrants from all nations, and invested them with the rights of citizenship; and whereas, it is claimed that such American citizens, with their descendants, are subjects of foreign states, owing allegiance to the governments thereof; and whereas it is necessary to the maintenance of public peace that this claim of foreign allegiance should be promptly and finally disavowed: Therefore any declaration, instruction, opinion, order, or decision, of any officer of the United States, which denies, restricts, impairs, or questions the right of

[1] See Stoughton v. Taylor, 2 Caine, C. C. 655.

[2] Law of Nations, b. 1. § 223 and context.

expatriation, is declared inconsistent with the fundamental principles of the Republic.'[1]

## (2 *f a*) OF THE LEGISLATIVE POWERS OF THE STATE LEGISLATURES: AND HEREIN FIRST (1 *g b*) OF THE CONSTITUTION OF THESE BODIES.

§ 186. Policy of dividing the legislative bodies.

By each of the state constitutions, the legislative power of the government is vested in a state legislature, composed of two distinct branches, a house of representatives, and a senate, each of which has a negative on the other.[2] This constitution of the legislative body, making it to consist of two independent and co-ordinate branches, is founded in the policy of dividing and arranging the several offices in such a manner that each may be a check on the other, and of so contriving the interior structure of the government, as that its several constituent parts, by their mutual relations, may be the means of keeping each other in their proper places.[3] It is a part of the policy essential to our system, by which the political power is divided between two governments for the people of each state, the one internal, the other external, and then the portion allotted to each government subdivided, among its separate departments. Hence a double security arises to the rights of the people. 'The different governments will control each other, at the same time that each will be controlled by itself. The great security against a gradual concentration of the several powers in either government, or in either department of either government, consists in giving to those who administer each the necessary constitutional means, and personal motives, to resist encroachments of the others. The provision for defence, in this,

[1] Rev. Stats. U. S. § 1999; Act 27th July, 1868, *c.* 249, § 1; Stats. at Large, v. 15, p. 223.

[2] The two branches are distinguished in different states by different names. See p. 89, *ante*.

[3] The Federalist, No. 51, pp. 238-240.

as in all other cases, must be made commensurate to the danger of attack. Ambition must be made to counteract ambition. The interest of the man must be connected with the constitutional rights of the place. It may be a reflection on human nature, that such devices should be necessary to control the abuses of government. But what is government itself but the greatest of all reflections on human nature!"[1]

§ 187. House of Representatives.

The members of the house of representatives, numbering generally about four to one of the senators, are elected annually in some of the states,[2] and biennially in others,[3] by and from among the qualified electors; and the representation is apportioned among the several towns or counties, as nearly as may be, according to their respective numbers. The qualifications for membership, are sometimes prescribed by the state constitution, and at other times left to be determined by the electors themselves. The members, however, must always be electors and residents of the state.

§ 188. State Senate.

The senators also, varying in number from twelve to forty or over, but always a much less numerous body than the house of representatives, are elected by and from among the electors; the state being divided into senatorial districts, and the electors of each district entitled to a senator. They are chosen for various terms; one year,[4] two years,[5] three,[6] or four years.[7] When chosen for three years, they are divided into three classes; the seats of the first class are vacated at the expiration of the first year; of the second, at the expiration of the second year; and of the third, at the expiration of the third year; so that a third of their number is elected annually. When chosen for four years, they are divided into two classes, and one-half of their number is elected biennially. The qualifications

[1] The Federalist, No. 51, pp. 239, 241.
[2] As in Maine, N. H., Mass., R. I., Conn., N. Y., N. J., Penn.
[3] As in Del., Tenn., Ky., Ohio.
[4] In Maine, N. H., Ver.
[5] In New York.
[6] In New Jersey, Pennsylvania.
[7] In Del., Md., Ky., Ind.

for senators are also different in different states. In some of the states,[1] they must be thirty years of age; in others,[2] twenty-five or over; and in all, they must be from the body of electors, and have also been for a period varying from one to seven years, inhabitants of the state.

The regular sessions of the state legislatures are generally annual; though in some states they are only biennial.

§ 189. Powers of each house. Privileges of members, &c.

Each branch of the legislature is invested with all the powers essential to a legislative body, except that the concurrence of both branches is necessary in the enactment of laws.[3] Each house is the sole judge of the election returns and qualifications of its members. Each elects its own speaker, clerk and other officers, except in some few states where the lieutenant-governor is president of the senate. Vacancies are usually filled by new elections; sometimes however by the house and senate jointly. The house is invested with the sole power of impeachment, and the senate with the sole power of trying impeachments. The members of both branches, in all cases except treason, felony, and breach of the peace, are privileged from arrest, during attendance at the sessions of their respective houses, and in going to and returning from the same; and for any speech or debate in either house, they cannot be questioned in any other place. They are also entitled to a compensation for their services, to be ascertained by law, and paid out of the treasury of the state.

### (2 *g b*) OF THE NATURE AND EXTENT OF THE LEGISLATIVE POWERS OF THE STATE LEGISLATURES.

§ 190. Powers, general, not enumerated.

THE legislature of each state, as we have formerly seen,[4] is invested by the state constitution with a general and

[1] N. H., Ver., N. J., Ky. [2] Penn., Del.

[3] See the General Form of a State Constitution, pp. 89, 90, *ante*.

[4] *Ante* p. 90, No. 49 of General Form of State Constitution.

discretionary power to make all reasonable laws and ordinances, proper and necessary for the defence of the state and the welfare of its people, and not repugnant to that constitution. The powers of the state legislatures, are not specified and enumerated, as are those of the federal legislature. As formerly remarked, in the state constitutions, we look only for express limitations; in the federal constitution, only for express and specific grants, of legislative power. In the words of the great Webster, 'Every state is an independent, sovereign, political community, except in so far as certain powers, which it might otherwise have exercised, have been conferred on a general government, established under a written constitution, and exerting its authority over the people of all the states. This general government is a limited government. Its powers are specified and enumerated. All powers not conferred upon it still remain with the states and with the people. The state legislatures, on the other hand, possess all usual and extraordinary powers of government, subject to any limitations which may be imposed by their own constitutions, and with the exception of the operation on those powers of the constitution of the United States.' [1]

§ 191. Powers denied to the States.

Sovereign, free and independent states, like natural persons, who are equal in right, must, in becoming members of a political union, agree to be governed by the common voice in the exercise of such rights as properly belong to their external sovereignty, and are not essential to the absolute right of self-government inherent in each. Each individual, for example, upon becoming a member of civil society, no longer retains his natural right of redressing and avenging violations of law; for one of the principal objects of the association was the establishment of a common authority for this very purpose. So when the union was formed, the war-making powers, together with others pertaining to the external sovereignty of each state, were, by common consent, confided to the federal government.

[1] See Webster's Letter to the Barings of London in 1839, Nile's Register, Vol. LVII, pp. 273–274. *Ante*, § 133.

And generally, the powers not essential to the external sovereignty of each state, were merged in the common authority of all; and the several states, by their federal compact, were prohibited from exerting those powers, except as therein excepted and provided. The provisions of the federal constitution expressly prohibiting the states from the exercise of powers, are the following:

'No state shall enter into any treaty, alliance or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make anything but gold and silver coin a tender in payment of debts; pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts; or grant any title of nobility.'[1]

'No state shall, without the consent of congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws; and the net produce of all duties and imposts, laid by any state on imports or exports, shall be for the use of the treasury of the United States, and all such laws shall be subject to the revision and control of congress. No state shall, without the consent of congress, lay any duty of tonnage, keep troops or ships of war in time of peace, enter into any agreement or compact with another state, or with a foreign power, or engage in war, unless actually invaded, or in such imminent danger as will not admit of delay.'[2]

Many other powers, being *exclusively* vested in the federal government, are thereby *impliedly* forbidden to the states.

§ 192. American Legislatures contrasted with the BritishParliament.

A distinguished writer, who is seldom or never at fault in his statements of the law, says 'It has never been questioned that the American legislatures have the same unlimited power in regard to legislation which resides in the British Parliament, except where they are restrained by written constitutions.'[3] It is not understood, however, that our constitutions were designed and formed to *restrain*

[1] Const. U. S. Art. 1, § 10.
[2] Id.
[3] See Am. Law Reg. for July, 1868, p. 521.

powers antecedently and independently existing. Their design was to *originate and delegate* powers, such as the people deemed proper and necessary to their governments; and to this end, the people sometimes resorted to express restrictions and prohibitions by way of defining the powers conferred. Strictly speaking, indeed, there is no analogy between the power of the British Parliament and the power of any American legislature. The former, theoretically at least, absorbs the absolute sovereignty of the nation, the power to make and unmake its constitution. The British theory is completely reversed by our American constitutions; the fundamental principle of our system being that 'all power is inherent in the people.' As a necessary consequence, our American legislatures possess no powers whatever but such as are *delegated* to them by our written constitutions. The only recognized power, in this country, at all analogous to that of the British legislature, is the inherent, inalienable, and paramount sovereignty of the people: which could never be confided to any legislature, without a total subversion of the very foundations of our American system. The British constitution is the will of Parliament. Our constitutions are the wills of our peoples—that is, of the bodies of electors composing the states. No American legislature, therefore, can alter or affect the constitution in which it is founded, and from which it derives its only authority.

'In England, the authority of Parliament runs without limits, and rises above control. It is difficult to say what the constitution of England is; it lies entirely at the mercy of Parliament; it bends to every governmental exigency; it varies and is blown about by every breeze of legislative humor or political caprice. In America, the case is widely different. Every state in the union has its constitution reduced to written exactitude and precision. What is a CONSTITUTION? It is the form of government, delineated by the mighty hand of the people, in which certain FIRST PRINCIPLES OF FUNDAMENTAL LAWS are established. The constitution is certain and fixed; it contains the permanent will of the people, and is the supreme law

of the land; it is paramount to the power of the legislature, and can be revoked or altered only by the authority that made it. The life-giving principle and the death-doing stroke must proceed from the same hand. What are the *legislatures?* *Creatures* of the constitutions; they owe their existence to the constitutions; they derive their powers from the constitutions; the constitutions are their commissions; and therefore all their acts must be conformable to them, or else they will be void. A constitution is the work of 'the people' themselves, in their original, sovereign, and unlimited capacity. A law is the work or will of the legislature, in their derivative and subordinate capacity. The one is the work of the creator and the other of the creature. The constitution fixes limits to the exercise of legislative authority, and prescribes the orbit within which it must move. In short, the constitution is the sun of the political system, around which, the legislative, executive, and judicial bodies, must revolve. Whatever may be the case in other countries, yet in this there can be no doubt that every act of the legislature repugnant to the constitution is absolutely void.'[1]

Numerous are the cases, threfore, in which acts of the legislatures, and acts of congress, have been declared void by the courts, as being repugnant to the constitution, state or federal or both.

§ 198. The vice of our system.

The security afforded by written constitutions, superior in authority to the wills of the legislatures, is, however, rendered abortive, by reason of the existence of that singular anomaly in the federal constitution, by which three-fourths of the *state legislatures*, without consulting the will of the people, may abolish the whole system of constitutional government in America. I refer to the power of amendment under which but recently, by a dominant political faction, the paramount sovereignty of the people of each state has been usurped, and our system of STATES UNITED upon the FEDERATIVE principle, completely over-

[1] *Per* Justice Patterson, 2 Dall. 307, *et seq.*

turned, and A SINGLE POLITICAL STATE erected instead.[1] This power of our *state legislatures*, to change the federal constitution at will, and *so to abolish their state constitutions*, is the radical vice of our system, an absolute self-contradiction in the theory of self-government.[2] The power to change the organic law of political societies, is the highest of sovereign powers, and can only belong to such legislatures as are clothed with the original, 'inherent and inalienable' sovereignty of 'the people.' It cannot exist in subordinate legislative bodies. Its *delegation* to the state legislatures, as the fifteenth amendment proves, was an act of political self-murder by 'the people' of each state. It was, in fact, the greatest of conceivable absurdities, to clothe them with a power to change the organic law of all the states, and yet deny to each the power to change its own!

## (3 *f a*) OF THE LEGISLATIVE POWER OF CONGRESS; AND HEREIN, FIRST

### (1 *g c*) OF THE CONSTITUTION OF CONGRESS.

§ 194. Division of congress.

THE federal government, as formerly remarked, is framed upon the model and principles common to the governments of the states. Its powers are divided between and vested in three several departments, legislative, judicial, and executive; though originally united and vested in a single body. Its legislative powers are vested in a federal legislature or congress, composed of a senate and a house of representatives.

The policy of dividing legislative bodies into two distinct branches,[3] is of greater importance perhaps as applied

[1] See §§ 171 to 179, *ante*. I would not be understood to say that this has been effectually accomplished; but only that such must be the effect of the XVth Amendment, if its underlying purpose be not arrested.

[2] See *ante*, §§ 87 *a*., 88.

[3] *Ante*, § 186.

to a federal than as applied to a state legislature: especially when, as in this country, sovereign states, in their several political capacities, and the people of those states, in their character of sovereign electors, are to be represented in the making of the federal laws.

§ 195. House of Representatives.

The federal house of representatives is composed of members chosen every second year by the *people of the several states;* that is, by such of the people in each state as have the qualifications requisite for electors of the most numerous branch of the state legislature.[1]

At the time of the formation and adoption of the federal constitution, the right of suffrage was regarded as a fundamental article of republican government, beyond the sphere of federal jurisdiction, and subject to the exclusive control of each body of electors in framing the state constitution. The question, therefore, who should be entitled to vote for representatives in congress, was left to be determined by the electors of each state, according as they should determine who should be entitled to vote for representatives in their state legislature.[2] This was always an essential of the internal sovereignty of 'the people' of each state; and it was intended to secure it against all possible encroachments of government, state or federal.

When vacancies happen in the representation of any state, the executive thereof issues writs of election to fill them.[3] The times, places, and manner, of holding elections for representatives in congress, are prescribed in each state by the legislature thereof: but congress may, at any time by law, make or alter such regulations.[4] This power was delegated to congress as a means of securing the election of members thereto, in case a state should neglect or refuse to make adequate provision for the purpose.[5]

The qualifications required for a representative in con-

[1] Const. U. S. Art. I, § 2.
[2] The Federalist, No. 52, p. 243. See *ante*, § 94 *et seq.*
[3] Const. U. S. Art. I, § 2.
[4] Id. Art. I, § 4.
[5] See the Federalist, No. 59; 1 Kent's Com. *232. *Ante*, § 94 *a*.

gress, are, to some extent, prescribed by the constitution. He must be of the age of twenty-five years; must have been seven years a citizen of the United states;[1] must, at the time of his election, be an inhabitant of the state he is to represent; and, during the time of his service, must hold no office under the United States.[2] Under these reasonable limitations, the people of a district may elect whomsoever they please for their representative.

§ 196. Apportionment of Representatives.

The federal representatives are now apportioned among the several states according to their respective numbers, counting the whole number of persons in each state, and excluding Indians not taxed.[3] The number of representatives to which a state may be entitled cannot exceed one for every thirty thousand; but each state is entitled to at least one representative.[4] The actual enumeration, or census of inhabitants, is once to be made in every ten years, and the representatives are then to be apportioned upon the same, under a new ratio, according to the relative increase of the population of the states.[5] The number of representatives at first fixed by the constitution, till a census should be taken, was sixty-five. But the apportionment under the fourth census, being to a ratio of one representative for every forty thousand persons in each state, made the whole number of representatives amount to two hundred and thirteen members.[6] Since then, with every new census, the ratio of representation has been enlarged, in proportion to the increased population; so that the number of members has generally been not far from two hundred and fifty.[7]

[1] Yet no one of the original negro representatives had been *seven years* a citizen of the United States.

[2] Const. Art. I, §§ 2 and 6.—See XIVth Amendment § 3, *ante*, p. 155.

[3] XIVth Amendment, § 2.

[4] Const. Art. I § 2.

[5] Id. § 2.

[6] 1 Kent's Com. * 230.

[7] The house of representatives is now composed of two hundred and ninety-two members, apportioned among the several states as follows: Maine, 5; New Hampshire, 3; Vermont, 3; Massachusetts, 11; Rhode

'No political problem is less susceptible of a precise solution, than that which relates to the number most convenient for a representative legislature: nor is there any point on which the several states have been more at variance in policy; whether we compare their legislative assemblies directly with each other, or consider the proportions which they respectively bear to the number of their constituents. The ratio between the representatives and the people, ought not to be the same, where the latter are very numerous, as where they are very few. Nothing can be more fallacious than to found our political calculations on arithmetical principles. Sixty or seventy men may be more properly trusted with a given degree of power, than six or seven. But it does not follow, that six or seven hundred would be a better depository. And if we carry on the supposition to six or seven thousand, the whole reasoning ought to be reversed. The truth is, that in all cases, a certain number at least seems to be necessary to secure the benefits of free consultation and discussion: and to guard against too easy a combination for improper purposes: as on the other hand, the number ought to be kept within a reasonable limit, in order to avoid the confusion and intemperance of a multitude. In all very numerous assemblies, of whatever characters composed, passion never fails to wrest the sceptre from reason. Had every Athenian citizen been a Socrates, every Athenian assembly would still have been a mob.'[1]

§ 197. The Senate.

The senate of the United States is composed of two senators from each state, chosen by the legislature thereof, for six years, and each senator has one vote.[2] The sena-

Island, 2; Connecticut, 4; New York, 33; Pennsylvania, 27; Delaware, 1; Maryland, 6; Virginia, 9; North Carolina, 8; South Carolina, 5; Georgia, 9; Alabama, 8; Mississippi, 6; Louisiana, 6; Ohio, 20: Kentucky, 10; Tennessee, 10; Indiana, 13; Illinois, 19; Missouri, 13; Arkansas, 4; Michigan, 9; Florida, 2; Texas, 6; Iowa, 9; Wisconsin, 8; California, 4; Minnesota, 3; Oregon, 1; Kansas, 3; West Virginia, 3; Nevada, 1; Nebraska, 1; New Jersey, 7.

[1] The Federalist, No. 55. Madison.

[2] Const. Art. I, § 3.

tors, immediately after they had assembled in consequence of the first election, were, in pursuance of the constitution, divided, as equally as might be, into three classes. The seats of senators of the first class were vacated at the expiration of the second year; of the second class, at the expiration of the fourth year; and of the third class, at the expiration of the sixth year; so that thereafter one-third might be, as they have since been, chosen every second year.[1] The provision was borrowed from a similar one in some of the state constitutions, of which Virginia gave the first example; and it is admirably calculated, on the one hand, to infuse into the senate, biennially, renewed public confidence and vigor, and, on the other, to secure the benefit of the experience of members in the administration of the federal affairs.[2] If vacancies happen by resignation or otherwise during the recess of the legislature of any state, the executive thereof may make temporary appointments until the next meeting of the legislature, which shall then fill such vacancies.[3]

§ 198. The states represented.

This constitution of the federal senate, was designed to secure to each state an equal voice and equal weight in the federal government, without any regard to disparity of population, wealth or dimensions;[4] and by a further provision, it is expressly declared, that no state shall, without its consent, be deprived of its equal suffrage in the senate.[5] These provisions of the federal constitution, are grounded in the sovereignty of the states: every independent community being, by the law of nations, an equal member of the society of nations, and having a perfect right to dictate its own terms, before it enters into a social compact. On the principle of a consolidation of the states, this organization of the senate would have been inadmissible; for in that case, each state would have been merged in one single

[1] Const. Art. I, § 3.
[2] See The Federalist, No. 62. See § 188 *ante*.
[3] Const. Art. I, § 3.
[4] See Rawle on Const. c. 3, p. 36.
[5] Const. Art. V.

and entire government.[1] At the time the articles of confederation were being prepared, it was attempted to allow the states an influence and power in congress in a ratio to their numbers and wealth: but the idea of separate and independent states, was at that day so strongly cherished, that the proposition met with no success.[2] The election of the senate by the state legislatures, is also a recognition of their separate and independent existence; and while rendering them absolutely essential to the operation, gives them such an agency in the formation, of the federal government, as must secure their authority.[3] Whether the appointment of senators shall be made by a joint or by a concurrent vote of the two branches of the state legislature, the constitution does not direct. The difference is that in a *joint* vote, the members of both houses assemble together and vote numerically; while a *concurrent* vote is taken by each house voting separately, the vote of the one receiving the assent of the other branch.[4] It seems to have been generally conceded, that as the legislature may prescribe the *manner* of choosing senators, it may prescribe that they shall be chosen by a *joint* vote or ballot of the two houses, in case the two houses cannot *separately* concur in a choice.[5]

The small number and long duration of the senate, were intended to render them a safe-guard against the influence of those paroxysms of heat and passion which prevail occasionally in the most enlightened communities, and enter into the deliberations of popular assemblies.[6] A disposition to multiply and change laws, upon the spur of the occasion, and to be making constant and restless experiments with the statute code, seems to be the natural disease of all such bodies.[7] In order, therefore, to counter-

[1] 1 Kent's Com. * 225.
[2] Id. Journals of Congress, Vol. III. p. 416.
[3] 1 Kent's Com. 225; The Federalist, No. 62.
[4] Rawle on Const. p. 87.
[5] See 1 Kent's Com. * 226.
[6] 1 Kent's Com. * 226.
[7] Id. * 227.

act so dangerous a propensity, and to maintain a due portion of confidence in the government, and to insure its safety and character at home and abroad, it is requisite that another body of men, coming likewise from the people, and equally responsible for their conduct, but resting on a more permanent basis, and constituted with stronger inducements to moderation in debate, and to tenacity of purpose, should be placed as a check upon the intemperance of the more popular department.[1]

§ 199. Qualifications of senators.

The qualifications required for senators,[2] as distinguished from those of representatives, consist in a more advanced age, and a longer period of citizenship. A senator must be thirty years of age, while a representative must be twenty-five; and the former must have been a citizen nine years;[3] while seven years only are required for the latter. The propriety of these distinctions, is also explained by the nature of the senatorial trust; which, requiring greater extent of information, and stability of character, requires, at the same time, that the senator should have reached a period of life most likely to supply these advantages; and which, participating immediately in transactions with foreign nations, ought to be exercised by none who are not thoroughly weaned from the prepossessions and habits incident to foreign birth and education.[4] The term of nine years appears to be a prudent mediocrity between a total exclusion of adopted citizens, whose merit and talents may claim a share in the public confidence, and an indiscriminate and hasty admission of them, which might create a channel for foreign influence on the federal councils.[5]

§ 200. Powers of each house, privileges of members, &c.

What was formerly remarked in speaking of the two branches of the state legislatures, holds equally true of

[1] Id. The Federalist, No. 62.

[2] Const. U. S. Art. I, § 3.

[3] Which however seems not to have been regarded in the case of the negro senator who succeeded to the seat of Mr. Jefferson Davis.

[4] The Federalist, No. 62, p. 284.

[5] Id.

the two branches of congress. Each is invested with all the powers essential to a legislative body, except that the concurrence of both is necessary in the enactment of laws. Each chooses its own officers, except that the vice-president of the United States, when not absent nor exercising the office of president of the United States, is president of the senate, but has no vote unless they be equally divided.[1] Each is the judge of the elections, returns, and qualifications, of its own members; and a majority of each constitutes a quorum to do business; but a smaller number may adjourn from day to day, and may be authorized to compel the attendence of absent members, in such manner, and under such penalties, as each house may provide.[2] Each house may also determine the rules of its proceedings, punish its members for disorderly behavior, and, with the concurrence of two-thirds, expel a member.[3] Each is directed to keep a journal of its proceedings, and from time to time, to publish the same, excepting such parts as may in their judgment require secrecy; and to enter on the journal the yeas and nays of the members, on any question, at the desire of one-fifth of those present.'[4] Neither can adjourn, during the session of congress, without the consent of the other, for more than three days; nor to any other place than that in which the two bodies shall be sitting.[5] The members of both houses are entitled to receive a compensation for their services, to be ascertained by law and paid out of the treasury of the United States: they are in all cases, except treason, felony, and breach of the peace, privileged from arrest during their attendance at the session of their respective houses, and in going to and returning from the same; and for any speech or debate in either house, they are not to be questioned in any other place.[6]

[1] Const. U. S., Art. I, §§ 2, 3.
[2] Const. U. S., Art. I, § 5.
[3] Id.
[4] Id.
[5] Id.
[6] Id. § 6.

Some incapacities are also incident to members of congress. No senator or representative may, during the time for which he was elected, be appointed to any civil office under the authority of the United States, which shall have been created, or the emoluments whereof shall have been increased, during such time; and, as we have seen, no person holding any office under the United States, may be a member of either house during his continuance in office;[1] or may, without the consent of congress, accept of any present, emolument, office, or title, of any kind whatever, from any king, prince, or foreign state.[2]

Congress is directed to assemble at least once in every year; and such meeting is to be on the first Monday in December, unless by law a different day for such meeting be appointed.[3]

## (2 *g c*) OF THE NATURE AND EXTENT OF THE LEGISLATIVE POWERS OF CONGRESS.

§ 201. Powers of congress specific and enumerated.

THE federal constitution, specifying and enumerating the powers of congress, declares and says:[4]—Congress shall have power—

To lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defence and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States:

To borrow money on the credit of the United States:

To regulate commerce with foreign nations, and among the several states, and with the Indian tribes:

To establish a uniform rule of naturalization and uniform laws on the subject of bankruptcies throughout the United States:

[1] Const. U. S. Art. I, § 6.
[2] Id. § 9.
[3] Id. § 4.
[4] Art. I, § 8.

To coin money, regulate the value thereof, and of foreign coin, and fix the standard of weights and measures:

To provide for the punishment of counterfeiting the securities and current coin of the United States:

To establish post-offices and post-roads:

To promote the progress of science and useful arts by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries:

To constitute tribunals inferior to the supreme court; to define and punish piracies and felonies committed on the high seas, and offences against the law of nations:

To declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water:

To raise and support armies; but no appropriation of money to that use shall be for a longer term than two years:

To provide and maintain a navy:

To make rules for the government and regulation of the land and naval forces:

To provide for calling forth the militia to execute the laws of the union, suppress insurrections and repel invasions:

To provide for organizing, arming, and disciplining the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the states respectively, the appointment of the officers, and the authority of training the militia according to the discipline prescribed by congress:

To exercise exclusive legislation in all cases whatsoever over such district (not exceeding ten miles square) as may, by cession of particular states and the acceptance of congress, become the seat of the government of the United States, and to exercise like authority over all places purchased by the consent of the legislature of the state in which the same shall be, for the erection of forts, magazines, arsenals, dockyards and other needful buildings; and

To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all

other powers vested by this constitution in the government of the United States, or in any department or officer thereof.

§ 202. Object of such specification and enumeration.

The first question, which naturally here presents itself, is, what was the *object* of this specification and enumeration of the powers of congress? Nothing of the kind had ever appeared in the state constitutions. The delegation of power to the state legislatures, had always been general; *to make laws at their own discretion*, except in certain cases expressly excepted by the state constitutions.[1] The delegation of power to the federal legislature, is precisely of the opposite character; *to legislate in certain enumerated cases, and not in any others.* Why the general commission on the one hand, and the special commission on the other? The reason of the difference is obvious, in the different ends to be attained. The one great purpose of a state legislature, is to make just laws for the regulation of such matters as are of common and equal importance to all the citizens of the state; — in other words, for the complete regulation of the internal government and police of the state. The principal end of a federal legislature, on the other hand, is not to make laws for the government of individuals in their relations to each other as citizens of a state, but to make laws concerning affairs of common and equal importance to all the states as members of the union[2] An enumeration of all the cases in which legislation might become proper for a state legislature, would have been exceedingly difficult, even had the jealousy of state authority been such as to require it. An enumeration of the powers of congress, however, was not only imperatively demanded, but successfully made. The necessity of fixing a boundary line between state and federal authority, was, as we have seen, clearly perceived and acknowledged by the framers of the federal constitution. 'It was easy to discover a proper and satifactory principle on the subject. Whatever object of government is confined in its operation and effects, within the bounds of a particular state, should be considered as belonging to the government of that state:

[1] See FORM of State Constitution, p 89, *ante.* [2] Page 200.

whatever object of government extends in its operation or effect, beyond the bounds of a particular state, should be considered as belonging to the government of the United States.[1] But though this principle be sound and satisfactory, its application to particular cases would be accompanied with much difficulty, because, in its application, room must be left for *great discretionary latitude of construction* of the principle. In order to lessen or remove the difficulty, arising from *discretionary* construction on this subject, an *enumeration of particular instances*, in which the application of the principle ought to take place, was attempted with much industry and care.'[2] Such, then, was the reason, for the specification and enumeration of the powers of congress. 'This specification of particulars evidently excludes *all pretention* to a *general* legislative authority; because, an affirmative grant of *special* powers would be absurd, as well as useless, if a general authority were intended.'[3] It is therefore clear, that congress can claim no powers but such as are actually granted to it by the federal constitution, and that the powers actually granted can be such only as are *expressly* given or given by *necessary* implication.[4]

§ 203. Limitations of power.

In this connection, we should also consider those clauses of the constitution which expressly restrain and limit the powers of congress. Such are the following :—[5]

The privilege of the writ of *habeas corpus* shall not be

[1] Even Pomeroy, the prince of the imperialists, admits this principle. He says (Constitutional Law, § 213), 'In regard to matters purely local, and which do not and cannot have a national aspect or influence, it has been the policy of the United States not to interfere with the separate states. *The constitution was framed upon this idea.* The people, as the source of all power, gave to their central government exclusive control over all subjects which are national and imperial, and to the separate states a control over all subjects which are local. I deem this policy as essential as is its counterpart, that the several states shall not interfere with the nation in the administration of its appropriate functions.'

[2] See Judge Wilson's account of the difficulties experienced by the convention. Elliot's Debates, Vol. II, p. 418; *ante* § 112.

[3] The Federalist, No. 83, pp. 381–382. Hamilton.

[4] Justice Story, 1 Wheat. 326. 3 Pet. Cond. 557.

[5] Const. U. S. Art. I, § 9.

suspended, unless when, in cases of rebellion or invasion, the public safety may require it.

No bill of attainder, or *ex post facto* law, shall be passed.

No capitation or other direct tax shall be laid, unless in proportion to the census or enumeration herein before directed to be taken.

No tax or duty shall be laid on articles exported from any state. No preference shall be given by any regulation of commerce or revenue to the ports of one state over those of another: nor shall vessels bound to or from one state be obliged to enter, clear, or pay duties in another.

No money shall be drawn from the treasury but in consequence of appropriations made by law; and a regular statement and account of the receipts and expenditures of all public money, shall be published from time to time.

No title of nobility shall be granted by the United States, and no person holding any office of profit or trust under them shall, without the consent of congress, accept of any present, emolument, office or title of any kind whatever, from any king, prince or foreign state.

§ 204. Further restrictions.

To these should be added the first ten amendments to the constitution,[1] expressly designed to limit the powers of the several departments of the federal government, though erroneously imagined by some to also extend to the governments of the several states. The doctrine is settled, that the limitations and restrictions of power contained in the federal constitution, other than such as are expressly addressed to the states, operate only on the federal government and its several departments; not on the states or the governments of the states.[2] Each state has established a constitution for itself, and, in that constitution, provided such limitations and restrictions on the powers of its particular government as its judgment dictated. The powers conferred on the federal government, were to be exercised by itself; and the limitations on power, in the instrument creating that government, if expressed in

[1] See *ante*, p. 151–153.

[2] See Barron *v.* The Mayor of Baltimore, 7 Pet. 248.

general terms, are naturally and necessarily confined to that government. Those limitations are limitations of power granted in the instrument itself, not of distinct governments, framed by different persons, and for different purposes. They must therefore be understood as restraining the power of the general government, not as applicable to the states.[1] So far, then, as the states do not infringe upon express provisions in the constitution of the United States, specially addressed to them, or upon those implied in the whole scope of that instrument, and in the grants of power to the general government, they may regulate their own internal economy as seems best to themselves. The United States are forbidden, either by the legislative, executive, or judicial department, to deprive a person of any of the immunities and privileges guarded by the federal bill of rights. The states may, in respect to their own inhabitants, if consistent with their own organic laws, infringe upon them all.[2]

On every principle of rational construction, recognized by common sense, and by judicial decisions, exclusive authority on any given subject is vested in the federal government in only three cases.

1. When the power is *expressly* granted.

2. When the power is vested in the general government, and *prohibited to the states.*

3. When the exercise of a power by the states would be contradictory and repugnant to the exercise of a rightful power by the general government.[3]

It must be recollected, that previous to the formation of the new constitution we were divided into independent states, united for some purposes, but in most respects sovereign.[4] These states could exercise almost every leg-

[1] Barron *v.* The Mayor of Baltimore, 7 Pet. 243. Marshall, C. J.

[2] Pomeroy's Constitutional Law, §§ 282–284, and cases there cited and considered.

[3] See The Federalist, No. 32; Sturgis *v.* Crowninshield, 4 Wheat. 122, 193, 198; Gibbons *v.* Ogden, 9 Wheat. 1; Houston *v.* Moore, 6 Wheat. 48. See also *ante,* § 127.

[4] I am using the language of Chief Justice Marshall; and I apprehend that in speaking of the *states,* he generally meant the *state governments.* See *ante,* § 131 and notes.

islative power; and amongst others, that of passing bankrupt laws. When the American people created a national legislature with certain enumerated powers, it was neither necessary nor proper to define the powers retained by the states. These powers proceed, *not from the people of America*, but *from the people of the several states*; and remain as they were before the adoption of the constitution, except so far as they may be abridged by that instrument.[1]

§ 205. The taxing power.

Let us now briefly examine the principal powers which are actually vested in the federal legislature, either by express grant, or by unavoidable implication.

The first of the enumerated powers of congress, is the power 'to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defence and general welfare of the United States.'[2]

In view of the several provisions relating to this subject, I shall briefly consider, first, What are the legitimate *purposes* for which taxes may be laid by congress; secondly, What *rules* are to govern congressional legislation on the subject of taxes; and thirdly, What is the *relation* of federal and state taxation.

§ 206. Purposes of the power.

(1) What are the legitimate *purposes* for which taxes may be laid by congress? The purposes expressed *in the grant*, are 'to pay the debts and provide for the common defence and general welfare of the United States.' If, however, the object or purpose of the particular enumeration of the powers of congress be kept out of view, a question may arise as to whether the clause conferring the power is or is not a grant of *two* distinct and several powers; namely, a *special* power 'to lay and collect taxes, duties,' etc., and a *general* power 'to pay the debts, and provide for the *common defence* and *general welfare* of the United States.' But the purpose of the particular enumeration being, as we have seen, to limit all powers to ascertained objects and prevent the possibility of their enlargement by construc-

[1] Marshall, C. J., Sturgis *v.* Crowninshield, 4 Wheat. 192–193.

[2] Const. U. S. Art. I, § 8. On this power of taxation, see The Federalist, Nos. 30 to 37.

tion or implication, all general powers are precluded;[1] and instead of reading the latter part of the clause as a delegation of power unlimited and all-comprehensive, we are to read it as a specification of those general objects for the attainment of which the particularly enumerated powers are granted.[2] The true meaning of the grant is rendered apparent, without adding or omitting a word, by reading it thus: 'To pay the debts and provide for the common defence and general welfare of the United States, congress shall have power to lay and collect taxes, duties, imposts and excises.[3] It is nevertheless certain that were congress unrestricted in the choice of the measures by which debts should be incurred, the common defence undertaken, or the general welfare pursued, the designation of the objects or purposes for which the power of taxing is given, would be wholly insignificant. But every measure which congress may adopt with a view to the common defence, the general welfare, or any of the great objects for which the federal government was established, must always be such as is proper and necessary to the execution of some one of those powers which are ascertained and enumerated by the constitution itself as being conferred upon the federal government. Otherwise, the doctrine might once and for all be laid down, that the power of congress is general, discretionary, and unlimited. For 'common defence and general welfare are terms of the broadest generality; and within them can be easily included all the objects for which governments may legitimately provide.'[4] To say that congress may adopt every measure considered by it as conducive to the 'common defence' or the 'general welfare,' is to totally abandon the constitution and every principle of constitutional government.

[1] *Ante*, p. 202.

[2] See The Federalist, No. 41, p. 192.

[3] 'The revenue of the United States is intended by the constitution, to pay the debts, and provide for the common defence and general welfare of the United States; to be expended, in particulars, in carrying into effect the laws made to execute the powers vested by the constitution in the government of the United States.' 16 Pet. 448, 449.

[4] See Pomeroy's Constitutional Law, §§ 273, 274.

§ 207. Rules controlling taxation.

(2) What *rules* are to govern congressional legislation on the subject of taxes? '*All duties, imposts, and excises,* shall be *uniform* throughout the United States.'[1] '*Direct* taxes shall be apportioned among the several states according to their respective numbers.'[2] '*No capitation,* or *other direct* tax, shall be laid, unless *in proportion to the census* or enumeration herein before directed to be taken.'[3] 'No tax or duty shall be laid on articles exported from any state. No preference shall be given by any regulation of commerce or revenue to the ports of one state over those of another: nor shall vessels bound to or from one state, be obliged to enter, clear, or pay duties in another.'[4] These are the provisions of the constitution which must govern congressional legislation on the subject of taxes. The rule of *uniformity,* then, must be observed in laying '*all duties, imposts, and excises:*' while the rule of *apportionment* among the several states, according to their respective numbers, as ascertained by an actual enumeration thereof within every ten years, must control all '*direct*' taxation.

§ 208. Direct and indirect taxes.

It is therefore necessary to distinguish between the different kinds of taxes. 'All duties, imposts, and excises,' are taxes; not direct, but *indirect;* and these include nearly all the subjects of ordinary revenue. A capitation, poll, or personal tax, is a *direct* tax.

All taxes are separated into two classes,—the *direct,* and the *indirect. Direct* taxes include those assessed upon land, and those which pass under the denomination of capitation or poll, and probably include no others. *Indirect* taxes would then embrace all the remaining species, and would be co-extensive with duties, imposts, and excises.[5] The rule of *apportionment,* applies to the former; the rule of *uniformity,* to the latter.[6]

[1] Const. U. S. Art. 1, § 8.
[2] Id. § 2. [3] Id. § 9. [4] Id.
[5] Pomeroy's Const. Law, § 277.
[6] By an act of congress, of 5th June, 1794, a tax of ten dollars was laid upon carriages for the conveyance of persons; and the question was

The fundamental principle of just taxation, is, that taxes ought to be *equally* borne by all alike in proportion to their ability to bear them. This is a principle of natural justice. A poll tax, as such, can never be just: because, it is a tax upon persons without respect to their ability to pay it. Of a like character are taxes on trades and professions. The trade or profession of one may annually amount to a thousand, and that of another to fifty thousand. Yet both must pay the same tax. Taxes on industry, art or skill, or anything else but the tangible and available property owned by a man, are not only impolitic, but positively unjust. The policy of licenses, is at all times questionable. If a particular business should be permitted, it ought to be open to all, subject to just regulations. If it should not be permitted, it ought not to be licensed.

§ 209. Power of taxing not limited.

No rule is prescribed which limits the amount of taxes to be raised. The power of taxing the people and their property, being essential to the existence of government, may be legitimately exercised on the objects to which it is applicable, to the utmost extent to which the government may choose to carry it. The only security against the abuse of this power, is found in the structure of the government itself. In imposing a tax, the legislature acts upon its constituents. This is in general a sufficient security against erroneous and oppressive taxation. The people give to their government a right of taxing themselves and their property; and, as the exigencies of the government cannot be limited, they prescribe no limits to the exercise of this right; resting confidently on the interest of the

raised, whether such tax was or was not a *direct* tax, subject to the rule of *apportionment* prescribed by the constitution. This question coming before the U. S. Supreme Court for decision, that court decided that such tax was not a direct tax, and that the rule of *uniformity* had been properly applied. Hylton *v.* The United States, 3 Dall. Rep. 171. See 1 Kent's Com. *225, *et seq.*

legislator, and on the influence of the constituents over their representative, to guard them against its abuse.[1]

§ 210. No tax upon justice.

Some things there are, however, which, upon fundamental principles of justice, ought to be wholly exempt from taxation, both state and federal. Such are all writs which are issuable from the courts as instruments of justice. Taxes on litigation are means of discouraging it, which some approve; but it ought not to be overlooked, that they are means of preventing the pursuit of justice; they are also means of denying it; especially to those who are most in need of it; and to deny it to any, or to hinder the pursuit, is not in accordance with the spirit of our constitutions. To tax the necessary instruments of justice, as though they were property, was never the policy of the states; but a part of the recent congressional policy of invading the rights of the states. To the honor of our people be it remembered, that that policy has been successfully resisted, and, we hope, forever ended.[2] It may even be doubted that such instruments could be taxed by the state legislatures, without an infraction of their *Bills of Rights*.[3] If the right to tax them exists, it may be carried so far as to amount to an absolute denial of justice. 'The right to tax implies the right to destroy.' It may certainly be affirmed, as an inviolable principle of our political system, that no constitutional power can exist in congress, or in any of the branches of the federal government, to control or hinder the process, methods or means of administering justice in the courts of a state. As well may congress usurp the control of the whole internal government of a state. The powers of state officials, are the powers of

[1] Marshall, C. J. in McCulloch *v.* The State of Maryland, 4 Wheat. 316, 428. Congress may tax the unrepresented District of Columbia. Loughborough *v.* Blake, 5 Wheat. 317. The power extends equally to all places within the jurisdiction of the government. 1 Kent's Com. * 256.

[2] The imposition of stamp duty on legal process is unconstitutional. Fifield *v.* Close, 2 Jennison, (15 Michigan), 505. See Warren *v.* Paul, 22 Indiana, 276.

[3] See FORM of State Constitution, at No. 22, *ante*, p. 84.

the sovereign, that is, of *'the people'* or *body of electors* composing the state. The process of the courts, the entire administration of justice, is in the name, and by the authority, of this absolute sovereign. A judge of any state court, therefore, who should permit the process of his court to be taxed, or the administration of justice therein to be controlled or affected, by any authority other than that of the state which invests him with the judicial office, would be guilty of a gross violation of his trust—would be guilty of treason against his sovereign.[1]

§ 211. Relation of federal and state taxation.

(3) What, finally, is the *relation* of federal and state taxation? The clauses of the federal constitution directly affecting the power of state taxation, are the following: 'No state shall, without the consent of congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws; and the net produce of all duties and imposts, laid by any state on imports or exports, shall be for the use of the treasury of the United States; and all such laws shall be subject to the revision and control of congress. No state shall, without the consent of congress, lay any duty of tonnage.'[2] And 'No tax or duty shall be laid on articles exported from any state.'[3] This last clause applies equally to both the federal and state legislatures. Hence results an exclusive power in congress to lay *duties on imports*:[4] but neither congress nor the state legislatures can lay any tax or duty on *exports*. If 'any duty of tonnage,' or 'duties on imports,' be laid by a state, the laws of the state concerning the same must be subject to the revision and control, and receive the assent of, congress. But the power of imposing taxes on all articles *other* than exports

[1] The efforts of Pomeroy (Const. Law, §§ 291-293) to defend the policy of congress in taxing 'papers used in the judicial proceedings of state courts,' all proceed upon the fallacy that *the evidences of right, and the means of its vindication*, are themselves *property*. This is proved to be the truth by the blindness that sees not the difference. § 204, *ante*.

[2] Const. U. S. Art. I, § 10.

[3] Id. § 9.

[4] The Federalist, No. 32, p. 140.

and imports, is manifestly a *concurrent* and *co-equal* authority in the federal and state legislatures.[1] The individual states should doubtless possess an independent and uncontrollable authority to raise their own revenues for the supply of their own wants. And with the sole exception of duties on imports and exports, they retain that authority under the constitution, in the most absolute and unqualified sense; and an attempt on the part of the federal government to abridge them in the exercise of it, would be a violent assumption of power, unwarranted by any article or clause of its constitution.[2] 'There is plainly no expression in the grant of the taxing power to congress, which makes that power exclusive. There is no independent clause or sentence which prohibits the states from exercising it. So far is this from being the case, that a plain and conclusive argument to the contrary is deducible from the restraint laid upon the states in relation to duties on imports and exports. This restriction implies an admission, that if it were not inserted, the states would possess the power it excludes; and it implies a further admission, that as to all *other* taxes, the authority of the states remains undiminished. It amounts to what lawyers call a *negative pregnant;* there is a *negation* of one thing, and an *affirmance* of another; a negation of the authority of the states to impose taxes on imports and exports, and an affirmance of their authority to impose them on all other articles. It would be mere sophistry to argue that it was meant to exclude them *absolutely* from the imposition of taxes of the former kind, and to leave them at liberty to lay others *subject to the control* of congress.'[3]

[1] The Federalist, No. 32, p. 140.

[2] Id. 140. Hamilton.

[3] Id. p. 141. Hamilton. Those who maintain the imperial theory, constantly refer to the *supremacy* clause, upon this as upon other subjects. In relation to which, Hamilton says: 'If individuals enter into a state of society, the laws of that society must be the supreme regulator of their conduct. If a number of political societies enter into a larger political society, the laws which the latter may enact, pursuant to the powers entrusted to it by the constitution, must necessarily be supreme over those societies, and the individuals of whom they are composed.

§ 212. Federal instruments not taxable by states.

It has been conceded, however, that from the operation of this general authority remaining in the states, over all other matters of legitimate taxation, the necessary instruments and means of carrying on the government established by the general constitution, must, from the necessity of the case, be considered exempt. For 'the right to tax, implies the right to destroy.'[1]

It is not denied that the power of taxation is to be concurrently exercised by the federal and state governments.[2] The power of state taxation is to be measured by the extent of state sovereignty; it extends to all subjects of state jurisdiction, to everything which exists or is introduced by state authority; but it does not extend to those means which are employed by congress to carry into execution its constitutional powers.[3] This leaves to a state the command of all its resources, and the unimpaired power of taxing the people and property of the state. But it places beyond the reach of state power all those powers conferred on the federal government, and all those means which are given for the purpose of carrying those powers into execution. This principle relieves from clash-

. . . . But it will not follow from this doctrine, that acts of the larger society, which are *not pursuant* to its constitutional powers, but which are invasions of the residuary authorities of the smaller societies, will become the supreme law of the land. These will be merely acts of usurpation, and will deserve to be treated as such. . . . . Though a law, therefore, laying a tax for the use of the United States would be supreme in its nature, and could not legally be opposed or controlled; yet a law abrogating or preventing the collection of a tax laid by the authority of a state, (unless upon imports and exports,) would not be the supreme law of the land, but an usurpation of a power not granted by the constitution. . . . . The inference from the whole is, that the individual states, would, under the proposed constitution, retain an independent and uncontrollable authority to raise revenue to any extent of which they may stand in need, by every kind of taxation, except duties on imports and exports.' Id. pp. 145, 146.

[1] We applied this argument to the taxation of state instruments by congress. Consistency requires that we admit its validity here. It is here only, however, that Pomeroy and others, advocates of the Imperial scheme, admit its application. Consistency is no part of their doctrine.

[2] McCulloch *v.* The State of Maryland, 4 Wheat. 316.

[3] Id.

ing sovereignty; from interfering powers; from a repugnancy between a right in one government to pull down and destroy what there is an acknowledged right in another to build up and preserve. There would be a plain repugnance in conferring on one government the power to control the constitutional measures of another, which other, with respect to those very measures, was declared to be supreme over that which exerts the control. If the states might tax one instrument employed by the federal government in the execution of its powers, they might tax every other instrument. They might tax the mail; they might tax the mint; they might tax the papers of the custom-house; they might tax judicial process; they might tax all the means employed by that government, to an excess which would defeat all its ends.[1]

§ 213. Thus a bank of the United States, though having its branches within the jurisdictions of the states, is not liable to state taxation.[2]

Nor can a state tax be laid upon stock created and issued for loans made to the United States; since that would be taxing a measure or means of carrying on the federal

[1] McCulloch *v.* Maryland, 4 Wheat. 316; 1 Kent's Com. * 426.

[2] McCulloch *v.* State of Maryland, 4 Wheat. 316; Osborn *v.* Bank of the U. S., 9 Wheat. 738. In the first of these cases, the court was careful to declare, that its decision was to be received with the qualification, that the states were not deprived of any resources of taxation which they originally possessed; that the restriction did not extend to a tax paid by the real property of the bank, in common with the real property within the state; nor to a tax imposed upon the interest which the citizens of Maryland might hold in that institution, in common with other property of the same description throughout the state. In the last, it was admitted, that if the bank was a mere private corporation, engaged in its own business and with its own views, and that its great end and principal object were private trade and private profit, it would be subject to the taxing power of the state, just as any individual would be. But such was not the case. The bank was not created for its own sake or for private purposes. It has never been supposed that congress could create such a corporation. It was not a private but a public corporation, an instrument necessary and proper for carrying into effect the powers vested by the constitution in the government of the United States.

government.[1] The same may be said of all the evidences of the public debt, United States bonds and other securities, of whatever character, and however held.[2] Neither may a state tax be laid upon the salaries of officers of the United States: such officers, of whatever character or capacity, being also necessary instruments to the due administration of the federal government, and their salaries the necessary means of securing their services.[3] The allowance to them, rests in the discretion of congress. The presumption is that the compensation given by law is no more than the services are worth, and only such in amount as will secure from the officer the diligent performance of his duties. The officers execute their offices for the public good. This implies their right of reaping from thence the recompense their services deserve; without that recompense being in any way lessened, except by the sovereign power from whom the officer derives his appointment, or by another sovereign power to whom the first has delegated the right of taxation over all the objects of

[1] Weston *v.* City Council of Charleston, 2 Pet. 449.

[2] In the case of The Bank of Commerce *v.* The City of New York, 2 Black, 620, a distinction was taken between a tax on United States stock *eo nomine*, and a tax on the *aggregate amount of capital* owned by a bank, however invested in United States securities or otherwise. This distinction, sustained by the New York Court of Appeals,—see The People *v.* The Commissioners of Taxes, 9 Smith (23 N. Y.), 192,—was overruled by the Supreme Court of the United States, which held, that stock of the United States is not subject to taxation under state laws; that a state law for that purpose is unconstitutional, whether it imposes a tax on the evidences of public debt by name, or includes them in the aggregate of the tax-payer's property, to be valued like the rest, at its worth; that the portion of the capital of a state bank which it has invested in United States stocks, bonds, and other securities, is not liable to taxation by the state; that the taxing power, so far as it is reserved to the states and used by them within constitutional limits, cannot be controlled or restrained by the federal judiciary, the prudence of its exercise not being a judicial question; that a state tax on the loans of the general government, is a restriction upon the constitutional power of the United States to borrow money; and if the state had such a right, being in its nature unlimited, it might be so used as to defeat the federal power altogether. See Bank Tax Cases, 2 Wallace, 200.

[3] Dobbins *v.* The Commissioners of Erie County, 16 Pet. 435.

taxation, in common with itself, for the benefit of both. And no diminution in the recompense of an officer is just and lawful, unless it be prospective, or by way of taxation by the sovereignty who has a power to impose it, and it is intended to bear equally upon all according to their estate.[1]

§ 214. On the other hand, a state tax on dividends arising from stock, held in a bank of the United States by a citizen of the state, has been adjudged constitutional. The states are not deprived of their right of taxation, except so far as it concerns the means, measures and instruments, necessary and proper for the execution of the powers vested by the federal constitution in the general government. This is the ruling principle of all the cases. The restriction upon state taxation does not extend to a tax to be paid by the real estate of a United States bank, in common with other real property of the same description within the jurisdiction of the state; nor does it extend to a tax on the interest that citizens of the state may hold in such bank, in common with other property of the same description throughout the state.[2] A contractor, says Chief Justice Marshall, for supplying a military post with provisions, cannot be restrained from making purchases within every state, or from transporting them to any place at which the troops are stationed, nor could he be fined or taxed for doing so. But the property of the contractor may be taxed as the property of other citizens.[4] Upon the same principle, though the salaries of United States officers may not be taxed by a state, yet their persons and property may, in common with other persons and property, within the jurisdiction of the state;[5] and though a bank

[1] Dobbins *v.* Commissioners, 16 Pet. 449.

[2] Berney *v.* Tax Collector, 2 Bailey's (S. C.) Rep. 654.

[3] See the case of McCulloch *v.* State of Maryland, 4 Wheat. 316. The decision in which it was declared by the court, must be received with these qualifications.

[4] Osborn *v.* U. S. Bank, 9 Wheat. 867.

[5] See the case of Melcher *v.* The City of Boston, 9 Metcalf, 73.

of the United States may not be taxed, yet individual interests therein are not exempt.[1]

The principle which runs through the subject of taxation, as through every other subject of concurrent jurisdiction in the federal and state governments, is that of a harmonious co-operation of sovereign powers within their respective spheres, which denies the right of one government to interfere with the measures, means, or instruments, necessary to the constitutional administration of another, and which prohibits the one from attempting to pull down and destroy what there is an acknowledged right in the other to build up and preserve.[2] The power of taxation is an obvious incident of sovereignty, and is co-extensive with that to which it is an incident.[3] These principles apply no less to the state than to the federal government, and no less to the federal than to the state government. To their operation, there should be no exception, and none can arise unless from a partisan spirit.

Thus much concerning the *taxing* power of the federal legislature.

§ 215. Power to regulate commerce.

The next in the order of the enumerated powers of congress, is the power '*To borrow money on the credit of the United States.*'[4] This speaks for itself; it is necessarily vested in the discretion of congress; and therefore, without uselessly pausing to comment upon it, we pass to the next; namely, the power '*To regulate commerce with foreign nations, and among the several states, and with the Indian tribes.*'[5]

One of the principal objects of vesting this power in congress, was the relief of the states which should import and export through other states, from the improper con-

[1] A state may lay a tax on the shareholders. City of Utica *v.* Churchill, 6 Tiffany, (33 N. Y.) 161, same case, (by name Van Allen *v.* The Assessors) 3 Wallace, 573; The People *v.* Commissioners of Taxes, 8 Tiffany (35 N. Y.), 423, same case, 4 Wallace, 244.

[2] *Ante.* § 212.

[3] *Per* Marshall, Ch. J., in McCulloch *v.* Maryland, *ut sup.*

[4] Const. U. S. Art. 1, § 8.

[5] Id.

tributions that might be levied on them by the latter. Were these at liberty even to regulate trade between state and state, it was clearly foreseen, that ways would be found out to load the articles of import and export, during the passage through their jurisdiction, with duties which would fall on the makers of the latter, and the consumers of the former.[1] It was therefore proper, that the power to regulate commerce, both inter-state and foreign, should be conferred upon the federal legislature. There is no analogy between the power of taxation and the power to regulate commerce. Congress has general power to tax; and yet it is universally admitted that the states may also tax. The reason is, that the constitution recognizes the states as bodies politic; and to their very existence as such, the power to lay and collect taxes is absolutely essential; while the power to regulate commerce is not.[2] No argument can therefore be drawn from the conceded concurrent power of the federal and state legislatures to exercise the function of taxation, in favor of a like concurrent jurisdiction over commerce. So far as congress has power to regulate commerce, that power is doubtless exclusive.[3]

§ 216. Extends not to internal affairs of a state

But the power of Congress over this subject, is very properly restricted to that commerce which concerns more states than one. It does not embrace that commerce which is completely internal, which is carried on between man and man in a state, or between different parts of the same state, and which does not extend to nor affect other states.[4] Nor does it extend to inspection laws. The object of inspection laws is to improve the quality of articles, to fit them for exportation, or, it may be, for domestic use. They act upon a subject before it becomes an article of foreign commerce, or of commerce among the states, and prepare it for that purpose. They form a portion of that immense mass of legislation which embraces everything

[1] The Federalist, No. 42, p. 196.
[2] Marshall, Ch. J., in Gibbons v. Ogden, 9 Wheat. 197.
[3] Gibbons v. Ogden, 9 Wheat. 1.
[4] Id. See also 1 Kent's Com. * 438.

within the territory of a state not surrendered to the general government; all which can be most advantageously exercised by the states themselves. Inspection laws, quarantine laws, health laws of every description, as well as laws for regulating the internal commerce of a state, and those which respect turnpike roads, ferries, etc., are component parts of this mass. No direct general power over these objects is granted to congress; and, consequently, they remain subject to state legislation. If the legislative power of the union can reach them, it must be where the power is expressly given for a special purpose, or is clearly incidental to some power which is expressly given.[1]

§ 217. Three general propositions, which relate to this subject as well as to many others, are regarded as established by judicial decision. 1. The delegation of a power to congress, the non-exercise of which, or legislation in virtue of which, has left a particular subject or class of subjects unaffected, does not exclude the states from passing laws relating to that subject or class of subjects.[2] 2. *General* legislation by congress in pursuance of a delegated power, designed to regulate matters of equal and common importance to all the states, does not oust a state of its jurisdiction concerning matters of immediate and peculiar importance to its own internal welfare, and which are not the direct objects of such general congressional legislation; although the laws of the state abridge private rights conferred by the laws which congress has enacted.[3] 3. Such general legislation by congress, however, excludes and annuls all state legislation concerning those general objects which the federal legislation had directly in view.[4]

Thus congress at an early day, in pursuance of the power now under consideration, enacted laws for the regulation of the coasting trade and the enrolment and licensing of vessels engaged therein, and thereby conferred,

[1] Marshall, Ch. J., in Gibbons *v.* Ogden, 9 Wheat. 203.

[2] Wilson *v.* Blackbird Creek Co., 2 Pet. 245.

[3] Id.

[4] Gibbons *v.* Ogden, 9 Wheat. 1. These propositions I take to be fully sustained by the subsequent decisions hereinafter referred to.

upon vessels duly licensed, a right to navigate the navigable waters of the states. One of the states, however, with a view to encourage the reclaiming and improving of low and marshy lands within its jurisdiction, incorporated a company with power to construct a dam across a navigable creek connecting with the ocean. The owner of a vessel duly licensed, broke and injured the dam constructed by the company, asserting his right to navigate the stream by virtue of his license and enrolment agreeably to the act of congress. The question of the validity of the state legislation abridging the rights conferred by the act of congress, was thus presented; and being carried to the Supreme Court of the United States, the state legislation was fully sustained.[1] The same high court, on a previous occasion, considering the question of the constitutionality of state legislation which granted to certain persons a right to the exclusive navigation of its waters, had adjudged the state laws void, so far as they prohibited vessels, duly licensed under the laws of congress, from navigating the waters of the state.[2] These two cases, I regard as sustaining the general propositions above laid down.

§ 218. The decision in relation to the stoppage of the creek, proceeded on the grounds, that measures calculated to enhance the value of property on the banks of navigable streams, and to probably improve the health of the inhabitants, are, so far as they do not conflict with the constitutional powers of the general government, within those powers which are reserved to the states; that, although the measure authorized by the state may abridge the rights of those who have been accustomed to use such streams, yet this abridgement, unless it comes in conflict with the constitution or a law of the United States, is an affair between the state and its citizens, of which the federal courts can take no cognizance; that congress, in pursuance of the power to regulate commerce, had passed no act the immediate object of which was to control state legislation

[1] Wilson v. Blackbird Creek Co., 2 Pet. 245.
[2] Gibbons v. Ogden, 9 Wheat. 1.

over such streams; and that the act of the state empowering the company to place a dam across the creek, was not repugnant to the power to regulate commerce in its dormant state.[1] The decision respecting the grant by a state of the *exclusive* right to navigate its waters, was placed on other grounds. Congress, in pursuance of the power to regulate commerce, had enacted laws, equally affecting the interests of all the states, and securing, and intending to secure, *equal privileges of navigation*, with which the grant by the state was in direct and open conflict. No state can pass laws interfering with these privileges.[2]

§ 219. The rule of constitutional construction necessarily invoked.

The power '*to regulate commerce*,' though limited by the words, 'with foreign nations, and among the several states, and with the Indian tribes,' is so general in terms, that it is difficult to determine its extent by reference merely to the language of the grant; and yet its importance can only be determined when once its extent has been ascertained. A rule or principle of construction must therefore be found outside of the grant. Where shall we find that rule or principle of construction? In the nature and objects of the instrument containing the grant. True; but not all are of one opinion concerning the nature and objects of that instrument. Some regard the instrument as being in the nature of a statutory law prescribed by a power superior to the states—the power of '*the people* of the United States' as *one political body*; although our records prove, as we have formerly shown, that no such political body ever existed;[3] that the only political bodies known in our system, are the several bodies of electors,

[1] See the opinion of the court, by Marshall, Ch. J., 2 Pet. 250. It is hardly to be supposed that the insignificance or importance of the stream was a ground of the decision: the stream in question being confessedly a *navigable* stream, communicating (indirectly) with the ocean, and the right of the licensed owner of the vessel to pursue his accustomed course in sailing up and down the same, being the only question before the court; and the question of the relative importance of navigable streams, being, I imagine, not only a difficult one for a court to decide, but also wholly of extra-judicial cognizance.

[2] Sinnot *v.* Davenport, 22 How. U. S. 227.

[3] See § 204.

being the several states. Others view the instrument as a federal compact between the states. The object of the instrument, is conceived and held, by the one of these schools, to be the establishment of a government strictly national, that is, for the people of the whole country as composing a single nation or state; by the other, to be the establishment of a government strictly federal, in the language of the preamble to the instrument, 'for the United *States* of America.' The powers of the general government are thus construed, by the one school, as co-extensive with the wants of the nation (as one political state), and as subject to such limitations only as are recognized by that government itself; by the other school, as measured and limited by the grants of power contained in the instrument, and as subject, finally, to the action of the states as the original fountains and sources of power. The principle of construction must therefore vary, according as the one or the other of these schools prevails. There also is, as we have seen, another theory; the advocates of which maintain, that though the instrument is a federal compact by and between the states, as co-equal members of the union, yet the object was, to form a common (national or federal) government, as to matters of common importance and equal interest to all the states, without any invasion of the internal right of self-government inherent in each; that, therefore, as to the enumerated powers confided to the general government, the rule of construction is, that 'whatever object of government is confined in its operation and effects, within the bounds of a particular state, should be considered as belonging to the government of that state; and whatever object of government extends, in its operation or effects, beyond the bounds of a particular state, should be considered as belonging to the government of the United States.'[1] This is the view which governed the framers of the federal constitution, and which has prevailed with the ablest expounders of that instrument, with the Supreme Court of the United States, and generally with the people at large. It was, as we have

[1] *Ante*, § 112.

seen, recognized and adopted by Chief Justice Marshall, and sanctioned by the court, in the first great case involving the power to regulate commerce. It was never abandoned by that great chief justice, nor by any but political partisans of the one or the other of the two extreme schools.

§ 220. Extent of the power.

In accordance with this view, the power of congress to regulate commerce, is restricted to that commerce *which concerns more states than one;* it does not comprehend that commerce which is completely internal, which is carried on between man and man in a state, or between different parts of the same state, and which does not extend to nor affect other states.[1] This is the key to the whole subject. If, therefore, it extends to places, to navigable rivers or streams, and to all the means and instruments of 'commerce with foreign nations and among the several states,' it extends to such of these objects only as are of general and equal interest to all the states, only to such as concern more states than one; to such matters, in short, as leave to the people of each state, their internal right of self-government in all that peculiarly relates to themselves. True, the power of congress in this particular, cannot stop at the external boundary line of a state: it must stop, nevertheless, at the very threshold of what peculiarly, exclusively and immediately concerns the welfare of the people of a particular state.[2]

§ 221. State licenses.

A state cannot, by way of regulating its *internal* commerce, require importers of foreign goods by the bale or package, to take out a license and pay for the same: because by doing so, it would contravene the provisions of the federal constitution, forbidding the states to lay duties on imports, and granting to congress the power to regulate commerce.[3] But other restrictions such as a state may

[1] Marshall, Ch. J. in Gibbons *v.* Ogden, 9 Wheat. 193.

[2] Gilman *v.* Philadelphia, 3 Wallace, 713; Cooley *v.* Port Wardens, 12 How. U. S. R. 299.

[3] Brown *v.* State of Maryland, 12 Wheat. 419.

deem reasonable and proper for the regulation of its own internal commerce, it is at liberty to impose. After imported goods have passed from the hands of the wholesale importer into those of the domestic trader, they are liable to state taxation, the same as other property of the citizens of the state;[1] and non-importers dealing in imported articles, whether by wholesale or retail, may be required to have a state license, the same as if dealing in domestic goods.[2]

§ 220. Internal police regulations.

The control of matters involved in what is indefinitely and vaguely termed the *internal police* of a state, is by all conceded to the state legislatures. Thus a state statute, requiring that every master of a vessel arriving at one of the ports of the state from a foreign country, or from a port in another state, should, within twenty-four hours, make a written report of the name, age, and last place of settlement of every passenger, was held to be valid, on the ground that it was merely a regulation of the internal police of the state. The court laid down the following as impregnable positions: That a state has the same undeniable, unlimited jurisdiction over all persons and things within its territorial limits, as any foreign nation, where that jurisdiction is not surrendered or restrained by the constitution of the United States; that, by virtue of this, it is not only the right, but the bounden and solemn duty of a state, to advance the safety, happiness, and prosperity of its people, and to provide for its general welfare, by any and every act of legislation which it may deem to be conducive to those ends, where the power over the particular subject, or the manner of its exercise, is not surrendered or restrained in the manner just stated; that all these powers which relate to merely municipal legislation, or what may, perhaps, more properly be called internal police, are not thus surrendered or restrained; and that, consequently, in relation to these, the authority of a state is complete, unqualified, and exclusive.'[3] But a law of a

[1] See 1 Kent's Com. 439 and *n*.

[2] See The License Cases, 5 How. U. S. R. 504 to 609.

[3] New York *v.* Miln, 11 Pet. 102, 138.

state requiring of the master of every vessel arriving from a foreign country or another state, to pay a certain sum for each passenger, to the support of a marine hospital, was pronounced to be unconstitutional and void; on the grounds, that the state law was a regulation of commerce; that persons as well as goods are the objects of commerce; and that congress had so legislated as to cover the ground in question.[1] Yet pilot laws, made by a state, have been sustained: for although these are regulations of commerce, congress has established no system of pilotage.[2]

§ 223. Bridging navigable streams.

The power of a state to interfere with the free navigation of navigable waters, in a very great measure depends upon whether such navigation is a matter of general concern, of interest to more states than one, or is something of importance to that state alone, and the importance of which may be outweighed by other considerations affecting that state. The exercise of the power in question, where the navigation is of consequence only to the state itself, and the act of interference is a measure of internal improvement and for the welfare of the state, is held to be, as we have formerly seen, within the sphere of state authority; although it abridges the rights of navigation conferred by general congressional legislation.[3] But a state can-

[1] Passenger Cases, 7 How. U. S. R. 283. The court was divided; five against, and four (including the chief justice) for, the state laws. See Sinnot *v.* Davenport, 22 How. U. S. R. 227.

[2] Cooley *v.* The Wardens of the Port of Philadelphia, 12 How. U. S. R. 299.

[3] Wilson *v.* Blackbird Creek Co., 2 Pet. 245; *ante*, § 186. To the same point, is the case of Gilman *v.* Philadelphia, 3 Wallace, 713. In this last case, the legislature of Pennsylvania had authorized the city to erect, and the city had commenced to erect, the new bridge over the Schuylkill river—the Chestnut street bridge. This river is *wholly* within the jurisdiction of the state of Pennsylvania, and divides the city of Philadelphia. It had often been bridged; and the new bridge was necessary in consequence of the constantly increasing demand for means of communication between the two portions of the city. The bridge, however, must interfere with navigation, and with rights enjoyed by virtue of congressional action in pursuance of the power to regulate commerce. The power of the state to authorize the bridge was therefore questioned. But the state authority was fully sustained by the Supreme Court of the

not authorize the construction of a bridge which interferes with the free navigation of a stream, where more states than one are immediately concerned in such navigation.[1] In such a case, the power to authorize the bridge or other obstruction, is a part of the power to regulate commerce vested in congress.[2]

United States: the court relying upon the principles enounced in the case of Wilson *v.* The Blackbird Creek Company; maintaining the distinction between subjects of commercial regulation which call for general and uniform legislation by congress, and subjects of commercial regulation which call for provisions suggested by the varying circumstances of different localities, and limited to such localities respectively; and also asserting the doctrine that the latter class of commercial subjects are within the control of the states respectively, and deciding that the case was one of this class. See § 220, *ante*.

[1] Pennsylvania *v.* The Wheeling Bridge Co., 13 How. U. S. R. 518.

[2] Pennsylvania *v.* The Bridge Co., (No. 2) 18 How. U. S. R. 421. The decision in the first of these cases, 13 How. U. S. R. 518, and that in Gilman *v.* Philadelphia, 3 Wall. R. 713, are regarded by Mr. Pomeroy as directly in conflict with each other (Pomeroy's Const. Law, § 871). He says, 'Laying out of view the Blackbird Creek case, the judgment in Gilman *v.* Philadelphia is opposed to the whole scope and tenor of all prior decisions, and is in direct conflict with Pennsylvania *v.* Wheeling Bridge Company. Indeed,' he goes on to say, 'these two cases are absolutely identical in their facts; in each, the plaintiff sought to protect his rights as proprietor on the banks of the river above the bridge; in each, a state, by its statute authorizing a permanent bridge, had interfered with those rights; in neither had congress directly legislated upon the subject of bridges. Yet the court overthrew the statute of Virginia, and upheld that of Pennsylvania.' The standpoint from whence his observations are taken, blinds him to the fact, in the Wheeling Bridge case, that the free navigation of the Ohio was a matter involving the interests of more states than one; as well as to the fact, in Gilman *v.* Philadelphia, that the navigation of the Schuylkill was of little or no consequence to any other state than that of Pennsylvania, and, so far as obstructed, of much less importance to her than the construction of the bridge. These are the facts which distinguished the cases; which brought the one within Gibbons *v.* Ogden, and the other within the Blackbird Creek case; and which called for the application of a theory quite different from that of Mr. Pomeroy, a theory adopted by Chief Justice Marshall in the former of these cases, and concerning this very subject, that 'The genius and character of the whole government [of the Union] seem to be, that its action is to be applied to all the external concerns of the nation, and to those internal concerns which affect the states generally, but not to those which are completely within a state, when they do

§ 224. Fisheries.

The power to regulate fishing in the navigable waters of a state, is clearly no part of the power to regulate commerce, and was never vested in any department of the general government. Each state, as we have seen, is the paramount owner and sovereign of the soil within its jurisdiction;[1] and the right to regulate fishing in navigable waters, is a right that follows the sovereignty of the soil underlying those waters.[2]

not affect other states, and with which it is not necessary to interfere for the purpose of executing some of the general powers of the government.' 9 Wheat. 194. This pointed the way. In Gibbons *v.* Ogden, and in the Wheeling Bridge case, the interests of more states than one were involved, and the question related to 'those internal concerns [of the nation] which affect the states generally;' while in Wilson *v.* The Blackbird Creek Co., and again, in Gilman *v.* Philadelphia, only the interests of one state were at stake, and little or nothing was affected but 'those internal concerns which are completely within a state.' Mr. Pomeroy (§ 378 of his work referred to) seems to fear that Gilman *v.* Philadelphia might warrant New York in bridging the Hudson river, or the East river, so as to affect navigation. And so it might, if his theory of the constitution were admitted and that of Chief Justice Marshall excluded. He finds it exceedingly difficult to reconcile the authorities with his fundamental position that the Union is a union of the whole people of the country as a single political state, and not a union of states, as several, sovereign and independent political communities; that the powers of the states, being delegated to them by 'the nation,' and in derogation of the sovereignty of 'the nation,' must be construed strictly; while the powers of the general government, being granted by 'the nation' for 'national' purposes, should be extended by construction, to every object of 'national' interest, that is, to every object which the 'national' government may deem an object of 'national' interest. Mr. Pomeroy would have us believe that wherever the Supreme Court of the United States has ignored this imperial doctrine,—and that is everywhere,—it has been strangely inconsistent, and guilty of a departure from original principles and venerated landmarks.

[1] *Ante*, § 8.

[2] Smith *v.* State of Maryland, 18 How. U. S. R. 71. The state had prohibited, by law, under certain penalties, fishing for oysters with a scoop or drag, within her jurisdiction of the Chesapeake Bay. The constitutionality of the law was questioned; but wholly sustained by the court. In this connection, see the opinion of the court in Martin *et al.* *v.* Waddell, 16 Pet. 410–417. It is of course understood, that any interference with the free use of waters for purposes of navigation and commercial intercourse, though under the pretext of regulating the use of fisheries and oyster beds, would, if it affected more states than one, render the state law void, to the extent of such interference. See 1 Kent's Com. * 439.

§ 225. Power of congress as to bankrupt laws.

The power 'To establish a uniform rule of naturalization and uniform laws on the subject of bankruptcies, throughout the United States,' is the next of the enumerated powers of congress.[1] So far as it relates to naturalization, this has already been briefly considered, in connection with the subject of citizenship to which it relates. Our attention is therefore here confined to the power 'to establish uniform laws on the subject of bankruptcies.' The propriety of vesting a power of this nature in the federal legislature, has never been seriously doubted. The principal difference of opinion respects the meaning of the term 'bankruptcies,' and consequently, the *extent* of the power; some holding that the term should be taken in its original and technical sense; others, that it ought to embrace all manner of insolvencies.[2] This diversity of opinion will probably continue to exist so long as the power shall remain undefined by the Supreme Court of the United States.

§ 226. State jurisdiction.

The exercise of this power by congress, has been occasional only; at times the country has languished for want of a suitable bankrupt code; and as the mere naked grant of the power to congress, does not itself restrain the states from exerting the power, various and different systems of laws for the relief of debtors have frequently existed, side by side, solely in virtue of state authority. This is an evil, which the grant of the power to the federal legislature was designed to avert.[3] If, however, congress fails

[1] Const. U. S. Art. I, § 8.

[2] According to Mr. Pomeroy (Const. Law, § 405), 'The constitution confers upon congress full power virtually to ordain one set of rules governing the relations of debtor and creditor throughout the whole extent of the country.' '*The subject of bankruptcies*' thus is rendered '*the relations of debtor and creditor.*' To extend the powers of the 'national' government, and limit those of the states, is, however, his constant aim.

[3] For once, at least, I fully concur with Mr. Pomeroy, whose theory especially, I have felt it my duty to oppose on every occasion. 'The great trade and commerce of the country now passes beyond the limits of any one state; it is in a measure international; the creditor resides in one state, under one municipal law, the debtor in a different commonwealth, which is governed by another local code. The diversities

in the discharge of its duty, or having established a bankrupt code, repeals the law it has passed on the subject, the power of the states to establish laws upon the subject of bankruptcies, such laws as each shall judge expedient, revives, and for the time exists as it would have existed if the power had not been vested in congress. The enactment of bankrupt laws by congress, suspends the power of the states; the repeal of such laws, revives that power.[1]

among the state laws which regulate the collection of debts, and the settlement of the estates of insolvents, whether fraudulent or simply unfortunate, are almost as numerous as the states themselves. In some, preferential assignments are permitted, in others forbidden; in some, long stays upon execution are allowed; in some, an insolvent may be discharged from liability with the consent of a definite portion of the creditors; in others, without the consent of any; in others still, not without the consent of all. Added to this discrepancy, it is firmly settled by the Supreme Court of the United States, that an insolvent's discharge under a state law has no extra-territorial effect; that it is not in the least binding upon a creditor residing in another commonwealth who has not assented to it, although he may have been notified of the proceeding and made a party thereto. . . . . Among the several states of the Union, this diversity, and its accompanying inconvenience, need not exist. . . . . The "uniformity" permitted by the organic law, would render a discharge in one state binding in all others; would establish the same acts and defaults of the debtor as occasions for bankrupt proceedings in every section; would abolish the iniquitous privilege of making preferential assignments; would enable the merchant in New York or Philadelphia who sells on credit to a trader in Illinois or Kentucky, to feel certain that when the time for payment should arrive, his debtor would not have failed and placed his assets completely beyond the reach of the deceived and exasperated creditor.' Pomeroy's Constitutional Law, §§ 404, 405.

[1] Sturgis *v.* Crowninshield, 4 Wheat. 122; Ogden *v.* Saunders, 12 Wheat. 213. In the last of these cases, 'The propositions which the adjudication maintains, are these: 1st. That the power given to the United States [to congress] to pass bankrupt laws, is not exclusive. 2nd. That the fair and ordinary exercise of that power by the states does not necessarily involve a violation of the obligation of contracts, *multo fortiori* of posterior contracts. 3rd. But when in the exercise of that power, the states pass beyond their own limits, and the rights of their own citizens, and act upon the rights of citizens of other states, there arise a conflict of sovereign power, and a collision with the judicial powers granted to the United States, which render the exercise of such a power incompatible with the rights of other states and with the constitution of the United States.' 12 Wheat. 369.

§ 227. Post-offices and post-roads.

The power 'To coin money, regulate the value thereof, and of foreign coin, and fix the standard of weights and measures,' and the power 'To provide for the punishment of counterfeiting the securities and current coin of the United States,' are simple in terms and sufficiently speak for themselves. I therefore pass to the power 'To establish post-offices and post-roads.' This, though very precisely expressed, has given rise to great differences of opinion concerning its extent, and also invoked the rules and principles of constitutional construction: some contending that it includes the power to construct or purchase buildings and roads of whatever description, and to any extent that congress may judge proper, with a view to the establishment, extension or regulation of the postal system; others that the power is exhausted by the establishment of the places for the reception and distribution of mailable matter, of existing roads as routes over which the mails shall be carried, and of laws and regulations for the proper government of the postal department. The extent of the power has never been determined by judicial construction. The legislative action of congress, however, seems to require that the grant be read, 'to purchase lands and erect buildings thereon; to grant the public lands in aid of lines of railway; and to pass all laws whatsoever which congress may judge expedient, provided they multiply post-offices and post-roads.'

§ 228. Patent and copyrights.

The power 'To promote the progress of science and useful arts, by securing, for limited times, to authors and inventors, the exclusive right to their respective writings and discoveries,' is the next of the enumerated powers of congress. Here the purpose of the power is expressed; to which purpose, the power is given as the means: in order to promote the progress of science and useful arts, congress has power to *secure*, for limited times, to *authors* and *inventors*, the *exclusive* right to their respective writings and discoveries. In pursuance of this power, laws have been passed by congress, by which the rights of authors and inventors are prescribed, secured and pro-

tected, and the progress of science and useful arts, greatly promoted. The states, perhaps, are not wholly deprived of their jurisdiction over the subject. But as authors and inventors could hardly be secure, under state legislation, in the *exclusive* right to their respective writings and discoveries; and as the power to secure such exclusive right cannot very well be divided, the power of the states in this particular, must be confined to such legislation as may not conflict with the laws prescribed by congress. In fact, no one can doubt that this is a matter of equal and common interest to all the states, and one that ought to be regulated by common authority and uniform laws. The fundamental rule of constitutional construction, plainly requires that the power of legislation concerning this subject be considered as exclusively in congress.

§ 229. Piracies and felonies on the high seas, and offences against the law of nations.

We come to the powers, 'To constitute tribunals inferior to the Supreme Court: To define and punish piracies and felonies committed on the high seas, and offences against the law of nations.'[1] The former requires no explanation: to the latter, therefore, our attention is directed. The definition and punishment of the offences mentioned, must doubtless be of common and equal importance to all the states. The power to define and punish them, is therefore vested exclusively in congress. The offences particularly mentioned, 'piracies' especially, are 'offences against the law of nations;' and the power to provide for their punishment would have passed to congress, if only the power to punish the latter had been conferred. Therefore the enactment of a law by congress, providing for the punishment of 'the crime of piracy as defined by the law of nations,' was held to be constitutional and valid.[2] Pirates are viewed not only in the light of public enemies, but as the enemies of the whole human race (*hostes humani generis*), and are everywhere punished with death.[3] The crime of

[1] Const. U. S. Art. I, § 8.

[2] The United States *v.* Smith, 5 Wheat. 153.

[3] Id. 161, 163; 6 How. U. S. R. 844. See 1 Kent's Com. * 185, *et seq.*

piracy is variously defined by the writers of public law; but all concur in holding that robbery or forcible depredation committed on the sea, *animo furandi*, is piracy.[1] It is the same offence at sea as robbery on land.[2] Many acts done on the sea, which do not properly fall within the definition of piracy, may be made piracy by particular statutes, and thus brought under the operation of the municipal criminal code. It is for this reason that congress is enabled not only to punish, but to *define* piracies. Thus the United States may, by special statute, declare, as they, Great Britain, and many other countries have declared, the *slave trade* to be piracy, and may inflict such punishments as are thought expedient, upon the persons engaged in the nefarious traffic.[3]

§ 230. Extent of the power to define and punish.

If the power of congress were limited to the *punishment* of the offences mentioned, their *definition* would have to be found in the law of nations, or the old common law. But as the power to *define* them is also included in the grant, the power of congress cannot be determined or limited by reference to either or both of those laws; in fact, it seems to involve an unlimited jurisdiction of all offences 'committed on the high seas;' that is to say, on the waters of the ocean without the jurisdiction of any state,[4] and of all 'offences against the law of nations.' The definition and punishment of such offences being of common and universal concern, and of equal interest to all the states, no valid objection to an unlimited power in congress to legislate in relation thereto, can be reasonably anticipated.

The definition of piracies might have been left, perhaps, to the law of nations; though a legislative definition of them is found in most municipal codes. A definition of felonies on the high seas, is evidently requisite. Felony is a term of loose signification, even in the common law of England, whence it is derived: and of various import in

[1] United States v. Smith, 5 Wheat. 153.
[2] Id.; 1 Kent's Com. * 183.
[3] Pomeroy's Const. Law, § 427.
[4] See 1 Kent's Com. * 367.

the statute law of that kingdom.[1] But neither the common nor the statute law of that or any other nation, ought to be a standard for the proceedings of this, unless they have previously been made our own by legislative adoption. The meaning of the term, as defined in the codes of the several states, would be a guide as impracticable as the former would be an illegitimate one. It is not precisely the same in any two of the states; and varies in each with every revision of its criminal laws. For the sake of certainty and uniformity, therefore, the power of defining felonies in this case, was in every respect necessary and proper.[2]

§ 231. War powers of congress.

Next, we come to the *war* powers of congress. These are—'To declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water: To raise and support armies; but no appropriation of money to that use shall be for a longer term than two years: To provide and maintain a navy: To make rules for the government and regulation of the land and naval forces: To provide for calling forth the militia to execute the laws of the Union, suppress insurrections and repel invasions: To provide for organizing, arming and disciplining the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the states, respectively, the appointment of the officers, and the authority of training the militia according to the discipline prescribed by congress.'[3]

§ 232. To make war and peace.

'To declare war.' It often happens that nations or states, like private individuals, must suffer a wrong, or repel it by force; and if, as is generally the case, the lat-

[1] Offences the punishment of which, at common law, involved the forfeiture of lands and goods, were denominated felonies; and perhaps it would now be difficult to say what offences are felonies, except by saying that all are felonies which would, at common law, have occasioned such forfeiture. In many of the states, however, where the statutes annex an ignominious punishment to an act, the act is called a felony.

[2] The Federalist, No. 42, p. 194.

[3] Const. U. S. Art. 1, § 8.

ter alternative be preferred, it is certainly proper, if not always necessary, that a solemn declaration of the injuries threatened or received, and of the nature of the security or redress demanded, should precede the employment of coercive measures. In all societies alike, whether of individuals or of states, the power must somewhere reside, to determine the question of peace or war, and as this is properly a legislative power, the exercise of which is of common and equal importance to all, it ought, without doubt, to be exclusively vested in the general legislature. In a union of states, this power would naturally belong to the federal council. It was therefore confided to congress by the original articles of confederation,[1] and the states were restrained, then, as now, from exerting the powers relating to war. In this respect, the power of congress is generally deemed to be exclusive. And as war cannot be lawfully commenced on the part of the United States without an act of congress, such an act is, of course, a formal official notice to all the world, and equivalent to the most solemn declaration.[2]

For its own protection, nevertheless, each state, without doubt, is fully clothed with all the rights of war; just as each individual member of society may lawfully protect himself, whenever the power of the state is too weak or too distant to shield him from danger or avenge his wrongs.[3]

§ 233. Letters of marque, etc.

'To grant letters of marque and reprisal.' The power to do this, is also exclusively vested in congress, and expressly denied to the states. It might have been well, perhaps, had it been wholly denied to the federal government, as well as to the states. For privateering, under all the restrictions usually adopted, is very liable to abuse. The object is not fame or chivalric warfare, but plunder and profit. The discipline of the crews is not apt to be of the highest order, and privateers are often guilty of

[1] Art. IX.

[2] 1 Kent's Com. *55.

[3] As to the War-Power of the State, see p. 98 *ante*.

enormous excesses, and become the scourge of neutral commerce.[1]

§ 234. Rules as to captures.

'To make rules concerning captures on land and water.' The word 'captures,' as here used, means *things taken* by the armed forces of the government, and not the acts of taking.[2] Congress may, therefore, make rules concerning all things taken, seized, or captured, by the national forces; may enact an entire code of prize regulations, for the disposition of things and persons captured from the enemy, whether on land or water, and whether in civil or foreign war.[3]

§ 235. To raise armies.

'To raise and support armies; but no appropriation of money to that use shall be for a longer term than two years.' The 'armies' referred to, are *standing* or *regular* armies, as distinguished from bodies of militia and organizations of volunteers.[4] The evil, and the necessity, of standing armies, are alike admitted. They are dangerous to the liberties of mankind, to the peace and security of the human race, and to whatever system of government they are called to maintain. But organized forces are necessary, and indeed indispensable, to the support of government, whether as against its internal enemies or its foreign foes. If it be urged that a faction may obtain the control of the government, and direct the powers of war

[1] 1 Kent's Com. * 97. The federal government, by its treaties with foreign nations, has almost rendered the power a nullity. In the various treaties between the United States and France, Holland, Sweden, Prussia, Great Britain, Spain, Columbia, Chili, etc., it is declared, that no subject or citizen of either nation shall accept a commission or letter of marque, to assist an enemy in hostilities against the other, under pain of being treated as a pirate. See 1 Kent's Com. * 100.

[2] Pomeroy's Const. Law, § 455.

[3] Id. See The Prize Cases, 2 Black's Rep. 635. There is, doubtless, as Mr. Pomeroy says, 'something exquisitely absurd in the supposition that a civil, any more than a public, war, can be waged under the protection of the Bill of Rights.' The absurdity, however, consists, not in maintaining the constitution inviolate, in war as in peace, but in the idea, that those who violate it should claim its protection.

[4] See The Federalist, Nos. 24 to 30.

to the accomplishment of their ends, the answer is, that that can only be the fault of the people themselves who support such faction. The power itself 'to raise and support armies,' must exist somewhere. To whom, then, should the power belong? It is doubtless safest in the hands of the immediate representatives of the people. It is one of those powers the objects of which are of equal and common importance to all the states. It could therefore only be vested in the federal legislature. Congress had, indeed, under the old confederation, an unlimited discretion to make requisition of men and money; to govern the army and navy; to direct their operations. As their requisitions were constitutionally binding on the states, who were in fact under the most solemn obligations to furnish the supplies required of them, the intention evidently was that the United States should command whatever resources were by them judged requisite to 'the common defence and general welfare.'[1]

§ 236. Checks and limits to the power.

'But no appropriation of money, to raise and support armies, shall be for a longer term than two years.' This was designed as a check to the power. The members of the popular branch of the federal legislature are elected for only two years. If the people disapprove of their measures, they return others in their stead. But in less than two years, a military government is established, and the free utterance of opinion, whether by speech, by the press, or by ballot, ended and silenced! This we have seen, in our own times, and in our own country. Is there, then, no limit to the power? There seems to be none which is not theoretical. No *practical limit* to the power has ever been found, or by any acknowledged, unless in the powers reserved to the states; of which we presently speak.[2]

§ 237. To provide a navy.

'To provide and maintain a navy.' The power of congress in this particular, is clearly unlimited. It can hardly be used, however, in a manner unfavorable to the liberties

[1] See The Federalist, No. 23, p. 105.

[2] See *post*, § 240, *et seq.*

of the people. Navies are seldom the instruments of tyranny. Nor are they, in modern times, of secondary importance to the glory and security of political states.

§ 238. To make rules for army and navy.

'To make rules for the government and regulation of the land and naval forces.' The object of this power, is the establishment of army and navy regulations; systems of tactics and discipline, and laws defining and punishing offences committed by persons in the army or navy. The rules prescribed by virtue of this power, apply to none but persons belonging to either the land or naval forces. They cannot be an authority for the trial, conviction and execution of civilians by military courts.

§ 239. To call in aid the militia of the states.

The remaining war powers of congress relate to the *militia*. These are—'To provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions: To provide for organizing, arming and disciplining the militia, and for governing such part of them as may be employed in the service of the United States; reserving to the states respectively the appointment of the officers and the authority of training the militia according to the discipline prescribed by congress.'

The term 'militia' here refers to the military forces of the states respectively. The militia always was, and still is, that of the states; the jurisdiction of the United States over it being at all times partial and exceptional.[1] The laws of the Union can be executed only, and insurrections and invasions can only take place, within the limits of the United States. And the power of congress to call forth the militia, being limited to the purposes mentioned in the grant,—namely, 'to execute the laws of the Union, suppress insurrections, and repel invasions;' it follows, of course, that the militia can never be marched, in any event, beyond the boundary lines of the country.

[1] Pomeroy's Const. Law, § 472.

§ 240. Power of the states over their militia.

The powers of the states, since the adoption of the federal constitution, have remained the same as before, except so far as abridged by that instrument. They are abridged by that instrument, as concerns the militia, only so far as relates to providing by law for organizing, arming and disciplining them, for calling them forth for the purposes specifically mentioned, and for governing such part of them as may be employed in the service of the United States. In other respects, the power of each state concerning its militia, remains complete, subject to no external control. The execution of the laws prescribed by congress for organizing, arming and disciplining the militia, together with the appointment of their officers, and the execution of all calls upon them, therefore remain with each state. And this being the case, the power of a state, over its militia, is practically unlimited. Even the power of enacting militia laws, so far as the ground is not actually covered by congressional legislation, yet remains with the states respectively.[1] A mere grant of power in affirmative terms to congress, does not *per se* transfer an exclusive jurisdiction over the subject. The powers vested in congress are never exclusive of similar powers originally existing in the states, unless where the constitution has expressly in terms given an exclusive power to congress, or the exercise of a like power is prohibited to the states, or there is a direct repugnancy or incompatibility in the exercise of it by the states.[2]

§ 241. State defence.

The power of the states concerning the militia, is their only power of self-defence. In time of peace no state can, without the consent of Congress, keep up troops or ships of war.[3] Its only arm of ready defence, if any it have, against usurpations in the federal government, or against insurrections or invasions, is a properly organized and disciplined militia.

The Federalist assured the people, pending the ratifica-

[1] Houston *v.* Moore, 5 Wheat. 1. See Martin *v.* Mott, 12 Wheat. 19.
[2] Id. The Federalist, No. 82, p. 140.
[3] Const. U. S. Art. 1, § 10.

tion of the federal constitution, that the powers reserved to the states were all-sufficient for their own defence. What were the powers referred to? Alexander Hamilton said: 'It may safely be received as an axiom in our political system that *the state governments will, in all possible contingencies, afford complete security against invasions of the public liberty by the national authority.* Projects of usurpation cannot be masked under pretences so likely to escape the penetration of select bodies of men, as of the people at large. The legislatures will have better means of information; they can discover the danger at a distance; and possessing all the organs of civil power, and the confidence of the people, they can at once adopt a regular plan of opposition, in which they can combine all the resources of the community. They can readily communicate with each other in the different states, and unite their common forces, for the protection of their common liberty. The great extent of the country is a further security. We have already experienced its utility against the attacks of a foreign enemy. And it would have precisely the same effect against the enterprises of ambitious rulers in the national councils. If the federal army should be able to quell the resistance of one state, the distant states would have it in their power to make head with fresh forces. The advantages obtained in one place must be abandoned, to subdue the opposition in others: and the moment the part which had been reduced to submission was left to itself, its efforts would be renewed, and its resistance revive. . . . . When will the time arrive, that the federal government can raise and maintain an army capable of erecting a despotism over the great body of the people of an immense empire, who are in a situation through the medium of their state governments, to take measures for their own defence, with all the celerity, regularity, and system of independent nations?'[1]

§ 242. But here the question again arises, has any state government the power to judge of usurpations by the federal gov-

[1] The Federalist, No. 28, pp. 126–127.

ernment? That it has, seems to be assumed in the foregoing argument of Alexander Hamilton. No state, indeed, can defend itself, or maintain its authority, except by means of its government. Nor is it impossible that cases may arise, in which the inalienable rights of a state, or of 'the people' of a state, may be invaded by the federal authorities. These rights, the state government is bound to protect. And who is the *final judge* of violations of these rights? If the federal government, their defence or protection as against usurpations by that government, becomes a manifest absurdity. There is nothing, then, in the doctrine of Hamilton, which may not become of practical importance. The case supposes 'the enterprises of ambitious rulers in the national councils;' and regards 'the people' as 'in a situation *through the medium of their state governments*, to take measures for their own defence, with all the celerity, regularity, and system, of independent nations.' In such a case, 'if the federal army should be able to quell the resistance of one state, the distant states would have it in their power to make head with fresh forces.' The federal army, then, the army which congress has power to maintain by virtue of the clause 'to raise and support armies,' is not to be confounded with the forces of a state; that is, with the militia. The former belongs to the federal government; the latter, to the state. And yet, 'to execute the laws of the Union, suppress insurrections, and repel invasions,' the federal government may call for the militia.[1] State resistance to federal authority is 'insurrection.' If this be true, all the states being equally bound by federal calls for their militia, the state which resists, is bound to contribute its quota, in order to put down its own resistance! If it does not willingly do this, the federal government may resort to conscriptions, may divide the state into military districts, and draft from each so many as necessary to put down the state resistance or 'insurrection!' I speak only of the *right*, the *constitutional right* of the federal government. It may or may not have the *power* or *force* sufficient. This

[1] See *post*, § 291.

can make no difference. Right is not determined by might; for that which is strong to-day, may be weak to-morrow; yet that which is right to-day, however weak or strong, will still be right to-morrow. The right of the government is determined by the constitution. It has a right to 'suppress insurrections' against its authority. State resistance is 'insurrection.' It matters not how many states engage therein, whether a few, a large majority, or all together. They are equally bound to contribute forces sufficient to enable the federal government to put down their resistance! This cannot be questioned; for if one is bound to aid in subduing the resistance of another, it is bound to aid in subduing its own resistance. How shall we escape this contradiction?

§ 243. Here we are driven to one of three grounds: 1. State resistance is, in all cases, insurrection, rebellion, against the general government. 2. Self-defence by a state is excepted. 3. State resistance by a constitutional majority (three-fourths) of the states, is constitutional. The first is equivalent to the unqualified assertion of the imperial theory, that the states have no rights but such as the general government may choose to concede to them. The second leads to the opposite doctrine, that each state is, singly and alone, in the last resort, the judge of violations of its rights, even as against the rest combined, and may, whenever it acts in self-defence, take any step it may deem expedient; resume the powers which it, in conjunction with the others, delegated to the federal government; withdraw itself or 'secede' from the union, and, to that extent, dissolve the confederacy. The third avoids these two extremes, by holding the decision of any one state to be subordinate to the will of the constitutional majority. This is the principle of action as among 'the people' of each state, themselves. It rests, as we have formerly shown,[1] upon the distinction between the *internal* sovereignty and the *external* sovereignty of 'the people' of each state; between the right of internal self-government, and

[1] *Ante*, §§ 14, 15, *et seq.*

the right to an equal voice with others in the direction and control of such affairs as are of equal importance to all. It is very well known that Hamilton was one of the principal leaders of the 'Nationals' in the convention that framed the federal constitution. As one of the distinguished writers of The Federalist, he afterwards candidly acknowledged his 'aversion to every project that was calculated to disarm the government of a single weapon, which, in any possible contingency, might be usefully employed for the general defence and security.'[1] He must therefore be understood, when speaking of state resistance against federal usurpations, as having in view the possible action of a constitutional majority of the states, and not as sanctioning the doctrine that a decision of the question of such usurpations can be made by the minority. Three-fourths of the states may constitutionally dissolve the union. Their decision, whether it be for or against the course of the general government, must in the end prevail.[2]

§ 244. Power over places ceded to United States.

The next of the enumerated powers of congress, is the power 'To exercise exclusive legislation, in all cases whatsoever, over such district (not exceeding ten miles square), as may, by cession of particular states, and the acceptance of congress, become the seat of government of the United States, and to exercise like authority over all places purchased, by the consent of the legislature of the state in which the same shall be, for the erection of forts, magazines, arsenals, dock-yards and other useful buildings.'[3]

The reasoning of 'The Federalist' in support of this delegation of power, is clear and conclusive. 'The indispensable necessity of complete authority at the seat of government, carries its own evidence with it. It is a power exercised by every legislature of the union, I might say of the world, by virtue of its general supremacy. Without it, not only the public authority might be insulted and

[1] The Federalist, No. 86, p. 160.
[2] See § 146, *et seq.*
[3] Const. U. S. Art. I, § 8.

its proceedings be interrupted with impunity, but a dependence of the members of the general government on the state comprehending the seat of the government, for protection in the exercise of their duty, might bring on the national councils an imputation of awe or influence, equally dishonorable to the government and dissatisfactory to the other members of the confederacy. This consideration has the more weight, as the gradual accumulation of public improvements at the stationary residence of the government, would be both too great a public pledge to be left in the hands of a single state, and would create so many obstacles to a removal of the government, as still further to abridge its necessary independence. The extent of this federal district is sufficiently circumscribed to satisfy every jealousy of an opposite nature. And as it is to be appropriated to this use with the consent of the state ceding it; as the state will no doubt provide in the compact for the rights, and the consent of the citizens inhabiting it; as the inhabitants will find sufficient inducements of interest to become willing parties to the cession; as they will have had their voice in the election of the government which is to exercise authority over them; as a municipal legislature for local purposes, derived from their own suffrages, will of course be allowed them; and as the authority of the legislature of the state, and of the inhabitants of the ceded part of it, to concur in the cession, will be derived from the whole people of the state, in their adoption of the constitution, every imaginable objection seems to be obviated.'

'The necessity of a like authority over forts, magazines, etc., established by the general government, is not less evident. The public money expended on such places, and the public property deposited in them, require that they should be exempt from the authority of the particular state. Nor would it be proper for the places on which the security of the entire union may depend, to be in any degree dependent on a particular member of it. All objections and scruples are here also obviated by requiring the

concurrence of the states concerned in every such establishment.'[1]

§ 245. Extent of the power.

The power 'to exercise exclusive legislation, in all cases whatsoever,' is, in terms, all-comprehensive. Language conferring a power of greater extent, over given localities, could not have been framed. No case can arise, civil or criminal, within the places ceded to the United States, to which the laws enacted by congress will not exclusively apply. In relation to such places, congress, in addition to its powers as the general legislature for the union, has all the discretionary powers of a state legislature. It is therefore within the jurisdiction of congress to provide for the punishment of offences committed in such places; to provide for the pursuit and arrest of criminals escaping therefrom, and, in short, to make all regulations for the due administration of justice, so far as proper or necessary to the complete execution of the principal power.[2] It follows as of course, that state courts cannot take cognizance of any offences committed within such ceded districts; and, on the other hand, that the inhabitants of such places cannot exercise any civil or political privileges under the laws of the state in which such places may be, because they are not bound by those laws.[3]

§ 246. The power 'to make all laws' etc.

The last of the powers enumerated in the eighth section of the first article of the federal constitution, is the power 'To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this constitution in the government of the United States, or in any department or officer thereof.'

It is hardly necessary to add to what was formerly said concerning this clause.[4] I therefore pass to the powers conferred upon congress by other clauses of the constitution.

§ 247. Concerning treason.

Section third of the third article, provides that 'congress

[1] The Federalist, No. 43, pp. 199, 200.
[2] See Cohens v. Virginia, 6 Wheat. 426, 429.
[3] 1 Kent's Com. * 430–431.
[4] See § 145, *ante*.

shall have power to declare the *punishment* of treason; but no attainder of treason shall work corruption of blood, or forfeiture, except during the life of the person attainted.' The *definition* of treason is not left to congress, but immediately prefixed to the grant of power to punish the offence. 'Treason against the United States shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort.' The same definition of the offence, as against a state, is generally given in the state constitutions. Treason, then, against a state, is not, necessarily, treason against the United States.[1] The power of congress over the subject, is limited to the punishment of the offence as against '*them*,' that is, as against the UNITED STATES. It should here be noticed, that there is no such thing as treason against 'the nation,'—a thing unknown to our constitutions. Against the United States, treason may doubtless be committed: for surely, they are no less sovereign collectively, than they are individually. The common government should therefore be enabled to punish the offence, as constitutionally defined. The reason of the constitutional definition, is given by The Federalist. 'It was to guard against new fangled and artificial treasons,' which 'have been the great engines by which violent factions, the natural offspring of free governments, have usually wreaked their alternate malignity on each other.' The framers of the federal constitution wisely sought to 'oppose a barrier to this peculiar danger, by inserting a constitutional definition of the crime, fixing the proof necessary for conviction of it, and restraining congress, even in punishing it, from extending the consequences of guilt beyond the person of its author.'[2]

§ 248. The power to admit new states

By section third of article fourth, 'New states may be admitted by congress into this Union: but no new state shall be formed or erected within the jurisdiction of any other state, nor any state be formed by the junction of two or more states, or parts of states, without the consent of

[1] 1 Kent's Com. *408 in note.
[2] The Federalist, No. 43, p. 200.

the legislatures of the states concerned, as well as of congress.'

In view of the imperial or absolutist theory, this is a most remarkable grant of powér. 'NEW STATES may be admitted by congress INTO THIS UNION.' Why! this is a Union of the American people? The clause should have read—'The One United State of America may be divided into as many separate and independent states as congress shall see proper; and such states may be from time to time disorganized and reconstructed, as congress shall deem expedient.'

In the articles of confederation, no provision is found on this important subject. Canada was to be admitted of right, on her joining in the measures of the United States; and the other *colonies*, by which were evidenly meant, the other British colonies, at the discretion of nine states. The eventual establishment of new states, seems to have been overlooked by the compilers of that instrument. The inconvenience of this omission, induced the framers of the new system to supply the defect. The general precaution, that no new states shall be formed without the concurrence of the federal authority, and that of the states concerned, is consonant to the principles which ought to govern such transactions. The particular precaution against the erection of new states by the partition of a state, without its consent, quieted the jealousy of the larger states; as that of the smaller was quieted by a like precaution against a junction of states, without their consent.[1]

§ 249. Power to govern territories, etc

By the same section of the federal constitution,[2] 'Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States; and nothing in this Constitution shall be so construed as to prejudice any claims of the United States or of any particular state.'

Concerning this, 'The Federalist' simply remarks, that 'the power is of very great importance, and required by

[1] The Federalist, No. 43, p. 200-201.
[2] Art. IV. § 3.

considerations similar to those which show the propriety of the former;' that 'the proviso annexed, is proper in itself, and was probably rendered absolutely necessary by jealousies and questions concerning the western territory sufficiently known to the public.'[1]

So far as concerns the territories, the clause was once construed as solely applying to those which were granted to the United States by the several states, prior to the adoption of the present constitution.[2] But that was a strained construction. Upon the same principle, the application of the clause should be confined, respecting 'other property belonging to the United States,' to such other property as was held by them under the old confederation. Territory or property since then acquired, would have to be governed by virtue of some other power. No reason appears for this distinction. The more obvious, natural, and legitimate construction,—considering that the object is one of common and equal importance to all the states,—is, that the power applies to all the territory, or other property, at any time belonging to the United States.[3]

§ 250. Guaranty of republican form of government, etc.

The fourth section of the fourth article provides, that 'The United States shall guaranty to every state in this Union a republican form of government, and shall protect each of them against invasion; and, on application of the legislature, or of the executive (when the legislature cannot be convened), against domestic violence.' This does not, in terms, confer any power upon congress; nor upon any department of the federal government. It says '*The United States* shall,' etc. The question may therefore arise as to the power of congress, or any branch of the *government* of the United States, under this provision. It does not say that the *government* of the United States shall guaranty, etc. But how could the United States

[1] The Federalist, No. 43, p. 201.

[2] See Scott *v.* Sandford, 19 How. U. S. R. 393.

[3] See the opinion of the court by Chief Justice Marshall in the Insurance Co. *v.* Cannter, 1 Pet. 511.

otherwise act than through and by means of their federal government? Could they form an alliance for the preservation of each as occasion should occur? Was not their power in this respect forever extinguished by this very guaranty which all gave to each? Here, then, we have an instance of authority conferred on the federal *government* by *unavoidable implication!* But on which department of that government? The judicial department, from its very constitution, is incompetent to the action that may be required. The authority must therefore be vested in the president, in congress, or in both. Is *legislative* action unavoidably necessary? If not, the authority therefor cannot be implied. So far as concerns protection against invasion or domestic violence, no other power than that of the executive can ever become necessary. And what sort of guaranty of a form of government can congressional legislation effect? To '*ordain and establish*' the form of government is the sovereign prerogative of 'the people' of each state. To '*guaranty*' it, is a very different thing; and can mean nothing more than to assure its continued existence. This cannot be done by extraneous legislation. No power is therefore conferred upon the federal legislature by this provision. The language is *not* that 'congress shall define what constitutes a republican form of government, and establish and guaranty the same to every state in the union.' To have vested a power of this nature in congress, or in any department of the federal government, would have made it simply omnipotent—would have been equivalent to a complete alienation of the inalienable sovereignty of the people! To determine, ordain, and establish the form of government, is to exercise the absolute sovereignty; and this no government can do on this side of the Atlantic.

§ 251. Object of the guaranty.

Of the provision in question, 'The Federalist' says: 'In a confederacy, founded on republican principles, and composed of republican members, the superintending government ought clearly to possess authority to defend the system against aristocratic or monarchical innovations. The

more intimate the nature of such a union may be, the greater interest have the members in the political institutions of each other; and the greater right to insist, that THE FORMS OF GOVERNMENT UNDER WHICH THE COMPACT WAS ENTERED INTO, should be *substantially* maintained.' This, then, was the object of the guaranty, 'that the *forms* of government *under which the compact was entered into*, should be *substantially* maintained.'[1]

'It may possibly be asked, what need there could be of such a precaution, and whether it may not become a pretext for alterations in the state governments without the concurrence of the states themselves. These questions admit of ready answers. If the interposition of the general government should not be needed, the provision for such an event will be a harmless superfluity only in the constitution. But who can say, what experiments may be produced, by the caprice of particular states, by the ambition of enterprising leaders, or by the intrigues and influence of foreign powers? To the second question it may be answered, that if the general government should interpose by virtue of this constitutional authority, it will be of course bound to pursue the authority. But the authority extends no further than to a *guaranty* of a republican form of government; which supposes a *pre-existing government of the form which is to be guaranteed.* As long, therefore, as the existing republican forms are continued by the states, they are guaranteed by the federal constitution. Whenever the states may choose to substitute other republican forms, they have a right to do so, and to claim the federal guaranty for the latter. The only restriction imposed on them is, that they shall not exchange republican for antirepublican constitutions: a restriction which, it is presumed, will hardly be considered as a grivance.'[2]

'The inordinate pride of state importance has suggested to some minds an objection to the principle of a guaranty in the federal government, as involving an officious interference in the domestic concerns of the members. A

[1] The Federalist, No. 43, p. 201.
[2] Id. pp. 201-202. *Per* Madison.

scruple of this kind would deprive us of one of the principal advantages to be expected from union; and can only flow from a misapprehension of the nature of the provision itself. It could be no impediment to reforms of the state constitutions by a majority of the people, in a legal and peaceable mode. This right would remain undiminished. *The guaranty could only operate against changes to be effected by violence.*"[1]

§ 252. THE LEGISLATIVE POWER,—first, of the people, next, of the state legislatures, and lastly of congress,—has now been examined as fully as consistent with the design of this work. By whom, in what way, and by what proceedings, our political constitutions were ordained and established, we have seen. In the ratifications of the federal constitution, and the system of government and the relations of the people thereby established, we have traced the acts of the sovereign, supreme and uncontrollable power, to the several states themselves. The nature and extent of the delegated powers of legislation, state and federal, we have also reviewed. It will now be our business to examine THE JUDICIAL POWER.

## (2 *e a*) OF THE JUDICIAL POWER: AND HEREIN, FIRST (1 *f b*) OF THE JUDICIAL POWER OF THE PEOPLE.

§ 253. High court of the sovereigns. The highest office that a man can fill is that of a sovereign and supreme judge not only of the makers of the law but also of the judges themselves. Yet this is an office which every American elector enjoys by virtue of the constitution of his state; and to the final judgment of the people, the highest officers of the state, as well as the lowest, even the judges of the supreme courts of the land, are bound to conform. In all free countries, public opinion must eventually prevail; and every individual,

[1] The Federalist, No. 21, pp. 93–94. Hamilton.

whatever his station, contributes in a greater or lesser degree, to the all-controlling expression of the popular mind. Not all, it is true, are entitled to equal participation in the RESOLUTIONS of the sovereign will, but each enjoys, by natural right, a voice in the popular deliberations which always precede those resolutions.

§ 254. On primary grounds, all men being equal in right, the opinion or judgment of one is of equal authority with that of another; and therefore all are equally entitled to decide upon matters of common concern. In this consists the natural sovereignty of men as members of society. But the very institution of the political state puts an end to this natural equality: a thing which exists and has always existed in theory only. A political union of individuals is clearly impossible, unless upon the basis of an organic law which determines and fixes the qualifications of the members who are to exercise political power, and therefore discriminates between them concerning their capacities for political rights. The natural sovereignty of human society can find expression only in the institution of political states. It does not cease to exist on account of political organizations, but as finding its only legitimate expression in and through them, it undergoes a change of character, and becomes political sovereignty. As such, in all free states, it resides in those who are clothed with the right of suffrage, by the organic law. These act throughout by their own authority, and acknowledge no superior; whether they act in the name of 'the people,' in the name of the voters or electors, or in that of the state. In fact, not all mankind are equally competent to give expression to the natural and original sovereignty in which all alike participate. The sovereign right to give the legitimate and all-controlling expression to this natural sovereignty, can therefore only reside in such as possess the qualifications required by the fundamental law of the state. Whoever has ears to hear and a tongue to speak, will exert, as of course, his share of influence on all the deliberations of the sovereign court of final resort. But the judgment

or decree of this court cannot be pronounced by any but the constitutional sovereigns themselves. Upon them, therefore, the preservation and maintenance of our liberties, and of all that we esteem, must finally depend. They are clothed with the absolute sovereignty of their political state; and therefore no limit to their power of final decision, or their power to make and interpret our organic law, or their power to enforce its observance, can ever be fixed except by themselves. The absolute sovereignty of a state, however, as formerly observed, is absolute only in respect of its own internal self-government, and its equal voice in relation to matters in which others with itself are equally concerned. For it must be admitted as a political axiom in our system, that an absolutely final decision on a matter of common concern can only be made by a constitutional majority; that is, on a matter of common concern to all the people of a state, by such a majority as their constitution requires; on a matter of common concern to all the states, by such a majority of the states as is fixed by the federal constitution for amendments thereof.

The government of a state, as well as the government of the United States, must judge, in the first instance, of the proper exercise of its powers; and its constituents, in the last. If the one or the other should overpass the just bounds of its authority and make a tyrannical use of its powers, 'the people,' whose creature it is, must appeal to the standard they have formed and take such measures to redress the injury done to the constitution, as the exigency may suggest and prudence justify.[1]

### (2 *f b*) OF THE JUDICIAL POWER OF THE STATE COURTS.

§ 255. General nature of the power.

In the course of our investigations, we are now to consider the power of interpreting, expounding, construing and applying the law, whether organic, statutory, or common, so far as the power is vested in the courts of the several states. Our attention is directed, first, to the general

[1] The Federalist, No. 33, p. 144. Hamilton.

nature and extent of this power; and secondly, to the several kinds of courts in which it is vested.

OF THE GENERAL NATURE AND EXTENT OF THE POWER. The one grand object of every investigation, whether judicial or extra-judicial, is to arrive at a true and correct *judgment* concerning the subject-matter of investigation. In order to any such judgment, however, the true relations of facts, involving their relations to law, must be ascertained. The first great duty of a judge, therefore, is to hear the allegations and the evidence of the facts. Two judgments, indeed, must always be formed, and finally merged in a single one. A judgment respecting the truth of the facts, is the first thing in order; a judgment of the law, as applicable thereto, is thence to follow. Hence, in courts pursuing the method of trial by jury, this business of arriving at a final judgment, is divided; the jury are the judge of the facts; the court, of the law as applicable to them; and these two judgments, the verdict of the jury and the opinion of the court, are brought to an agreement in the formal judgment entered by the court. Even in courts proceeding without the intervention of a jury, essentially the same course is pursued; a judgment of the facts and a judgment of the law concur in one: which final judgment, as the basis of process of execution, is the one great object of the investigation.

§ 256. Not legislative nor executive.

It is therefore evident that the judicial power is neither a legislative nor an executive power. Each of these powers is properly limited to one grand object. To prescribe the law is the object of the legislature. To construe it, to judge of its true application to cases as they arise, is the object of the judiciary, and the next thing in order, as necessarily prior to the proper execution of the law; and when judgment is finally pronounced, and execution directed in accordance with law, the object of judicial investigation is attained and the office of the judge at an end.[1] The proper office of the executive power, is neither

[1] On the power of the courts to make rules respecting the practice therein, see 6 Pet. Cond. Rep. 15, *et seq.* The question involved is this—May the legislature delegate its trust?

to make nor expound, but to execute the law, as made and expounded.

Executive officers, consequently, in all cases, must base their action upon legal judgments. But in many cases, such judgments are pronounced by their legal advisers, or else by themselves; and not by the courts in the first instance. A judicial power or discretion is often vested in executive officers, and even in legislative bodies. The one great object of the power, however, is always the same, in whatever hands it may happen to be placed. Whoever pronounces the judgment of the law, exercises the judicial power. It is not the name of the department of government, in which the power is vested, that determines the character of the power.

§ 257. Three powers distinct.

It is, as we have seen, a favorite principle of our constitutions, that the legislative, judicial, and executive powers, shall be kept apart, separate and distinct; that the officers entrusted with any one, shall not be entrusted with any other. No political principle is of greater intrinsic value, or is stamped with the authority of more enlightened patrons of liberty. The accumulation of all powers, legislative, judicial, and executive, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny.[1] Montesquieu says, that the political liberty of the citizen consists in a tranquillity of mind arising from the opinion each person has of his safety; and that in order to have this liberty, it is requisite that the government be so constituted that one needs not to be afraid of another. Now, says he, if the legislative and executive powers are united either in one and the same person or in one and the same body of magistrates, there can be no political liberty; because apprehensions and fears may arise, lest that person, or that body, should enact tyrannical laws, and execute them in a tyrannical manner. Again, he says, there is no liberty if the judiciary power be not separated from the legislative and executive.

[1] The Federalist, No. 47.

Were it joined with the legislative, the life and liberty of the citizen would be exposed to arbitrary control: for the judge would then be the legislator. Were it joined to the executive power, the judge might behave with violence and oppression. There would be an end of everything, were the same man, or the same body, to exercise these three powers; that of enacting laws, that of trying the causes of individuals, and that of executing the public resolutions.[1]

History is full of examples of political systems, in which the want of a proper division of the principal powers of government, was the prime defect. Nothing indeed is so difficult to accomplish, in the framing of organic laws or political constitutions, as the perfect balancing and counter balancing of the several powers, legislative, judicial, and executive. Yet nothing has ever so much contributed to the security of the liberties of the people, as the separate organization and distribution of these three powers, upon such a basis, and in such a manner, as that their co-existence, co-independence, and co-operation, cannot but result from the mere exertion of each within its appointed sphere, and effectually guard and protect the people against that silent and gradual absorption of their liberties, toward which, because of the encroaching nature of political power and the constant growth and expansion of precedent, all governments alike must tend.

§ 258. Necessity of an independent judiciary.

The principle requiring that the three great powers of government be vested in separate departments, or in different bodies, does not require that they be wholly unconnected with each other;[2] it simply requires, that they be so divided and balanced among the several bodies of magistracy, as that no one can transcend its constitutional limits, without being effectually checked and restrained by the others.[3] The object is, to secure the independence of each, and thereby make it a check upon, and a protec-

[1] Spirit of Laws, b. XI, c. 6; 1 Bl. Com. 146.

[2] See The Federalist, Nos. 47 and 48, where this principle is fully examined.

[3] Id. See also Jefferson's Notes on the State of Virginia, p. 195.

tion to the people against, usurpations by the others. Yet, if it belongs to the courts to expound and construe the law, as it unquestionably does, then to them it belongs to decide all questions respecting the spheres and limits of the other departments, as well as of the sphere and limit of the judicial department. Hence nothing can be more important than an independent judiciary. The independence of the judiciary, is the only ultimate security of the people. It is only to courts, empowered to declare legislation void when not in conformity with the constitution, and to judge of violations and infractions of law, that the people can finally look for protection, whether as against the acts of public officials, or as against the acts of private individuals. If therefore the judges be not independent, no well founded hope for a due administration of government, in accordance with organic laws and acknowledged principles of justice, can be entertained.[1]

§ 259. Extent of the judicial power of the states.

The judicial power of a state, must of necessity be coextensive with the operation of its own constitution and laws, or else the organic, and all other law, must become a mere nullity, for want of a competent power to construe and expound it, and to render a legitimate judgment in accordance with it. No limit can therefore be set to the judicial power of a state, except so far as it is bounded by the judicial power of the United States; which, by the federal constitution, is declared to 'extend to all cases, in law and equity, arising under that constitution, the laws of the United States, and treaties made or which shall be made under their authority; to all cases affecting ambassadors, other public ministers and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more states; between a state and citizens of another state; between citizens of different states; between citizens of the same state claiming lands under grants of different states, and between a state or a citizen

[1] On the vast importance of an independent judiciary, see The Federalist, No. 78, pp. 356–360.

thereof, and foreign states, citizens or subjects.'[1] The judicial power of a state must therefore extend to all other cases; and, by the eleventh amendment, even to suits in law or equity, commenced or prosecuted against the state by citizens of another state, or by citizens or subjects of any foreign state.[2]

§ 260. Concurrent jurisdiction of state and federal judiciary.

Some of the cases enumerated, as within the federal judicial power, are also within the judicial power of the states. The federal and state judiciary have a concurrent jurisdiction of 'controversies between a state and citizens of another state; between citizens of different states; between citizens of the same state claiming lands under grants of different states; and between a state or a citizen thereof, and foreign states, citizens or subjects:' except as to suits in law or equity, commenced or prosecuted against a state by citizens of another state, or by citizens or subjects of any foreign state; as to which

[1] Const. U. S. Art. III, § 2. See Cohens v. Virginia, 5 Pet. Cond. R. U. S. 107, *et seq.*; 6 Wheat. 264.

[2] On this Amendment see 5 Pet. Cond. 116, *et seq.* While weighing arguments drawn from the nature of government and from the general spirit of the organic law, and urged for the purpose of narrowing the construction which the words of that law seem to require, it is proper to place in the opposite scale, those principles drawn from the same sources and which go to sustain the words in their full operation and natural import. One of these principles is, that *the judicial power of every well-constituted government must be co-extensive with the legislative, and must be capable of deciding every judicial question which grows out of the constitution and law.* If any proposition may be considered as a political axiom, this, we think, may be so considered. In reasoning upon it as an abstract question, there would, probably, exist no contrariety of opinion respecting it. Every argument proving the necessity of the judicial department, proves also the propriety of giving this extent to it. We do not mean to say, that the jurisdiction of the courts of the Union should be construed to be co-extensive with the legislative, merely because it is fit that it should be so; but we mean to say, that this fitness furnishes an argument in construing the constitution which ought never to be overlooked, and which is most especially entitled to consideration, when we are inquiring, whether the words of the instrument which purport to establish this principle shall be contracted for the purpose of destroying it. *Per* Marshall, C. J., in Cohens v. Virginia, 5 Cond. R. U. S. 103, 104; 6 Wheat. 264.

suits, federal jurisdiction is denied by the eleventh amendment. In cases of which the federal judiciary has not exclusive jurisdiction, that judiciary wields a power which does not belong to it of necessity, but one which belongs to the state judiciary also; a power relating entirely to state laws, to rights and duties flowing from state legislation. For which reason, the federal jurisdiction is not supreme; the decisions of the federal courts, in such cases, are not binding on the courts of the states; the former are not interpreting or enforcing the law of the United States in any of its forms, but assuming to expound and apply the law of the particular state in which the controversy arose. The practice of the Supreme Court of the United States is therefore firmly settled, that in all controversies falling within this department of their jurisdiction, they will follow the statutes and authoritative decisions of the local courts which have defined and established the law of the commonwealth where the cause of action arose.[1] The judges of that court cannot be expected to be fully and particularly acquainted with all the statutes and local usages and customs and judicial decisions which go to make up the law of a state; and they themselves have held, that each state judiciary is presumed to best know its own law, and is the appropriate organ to expound and settle it.[2] They therefore not only follow, but change with, the state law.[3]

§ 261. Necessity of courts.

OF THE SEVERAL KINDS OF STATE COURTS. It will not be expected in a work of this nature, that the various courts of the different states be treated of with any degree of particularity. Only their general character will here be no-

[1] Pomeroy's Const. Law, § 759—referring to Luther v. Borden, 7 How. 1; Phalen v. Virginia, 8 Id. 163; Webster v. Cooper, 14 Id. 504; Beauregard v. New Orleans, 18 Id. 497; Gelpcke v. Dubuque, 1 Wallace, 175.

[2] See Elmendorf v. Taylor, 10 Wheat.; Bell v. Morrison, 1 Pet. 359, 360.

[3] Green v. Neal, 6 Pet. 301. Upon this subject, see the cases referred to. See also, Hinde v. Vattier, 5 Pet. 398; Cathcart v. Robinson, Id. 264; Jackson v. Chew, 12 Wheat 158; Daly v. James, 8 Wheat. 535; Blight's Lessee v. Rochester, 7 Wheat. 550; Leage v. Egery, 24 How. U. S. 264; Suydam v. Williamson, 24 How. U. S. 427; Gelpcke v. Dubuque, 1 Wallace, 206; Olcott v. Supervisors, 16 Wallace, 678.

ticed: premising, however, that as misunderstandings between individuals will always arise with respect to the meaning and requirements of the law in particular cases, there will always exist a positive necessity for courts of justice; wherein competent judges, persons distinguished and therefore selected for their wisdom and learning in the law, are clothed with authority to expound and apply it as cases arise.

§ 262. General character of courts.

A court, according to Blackstone,[1] is a place where justice is judicially administered. For the speedy and impartial administration of justice, each state has established a prodigious variety of courts, some with a more limited, others with a more extensive jurisdiction; some constituted to inquire only, others to hear and determine; some to determine in the first instance, others upon appeal and by way of review. There is one distinction, however, that runs throughout them all: *viz.* that some of them are courts *of record*, others *not of record*. A court of record is that, where the acts and judicial proceedings are enrolled in paper or parchment for a perpetual memorial and testimony: which rolls are called the records of the court, and are of such high and super-eminent authority, that their truth is not to be called in question. For it is a settled maxim that nothing shall be averred against a record, nor shall any plea, or even proof, be admitted to the contrary. And if the existence of a record be denied, it shall be tried by nothing but itself: that is, upon bare inspection whether there be any such record or no; else there would be no end of disputes. But if there appear any mistake of the clerk in making up such record, the court will direct him to amend it.[2]

§ 263. Constituents of a court.

In every court, there must be at least three constituent parts; the *actor*, or plaintiff, who complains of an injury done; the *reus*, or defendant, who is called upon to make satisfaction for it; and the *judex*, or judicial power, which

[1] 3 Bl. Com. 23.
[2] Id. 24.

is to examine the truth of the fact, to determine the law arising upon that fact, and, if any injury appears to have been done, to ascertain, and by its officers to apply, the remedy.[1]

The office of judge, in the state courts, is now very generally filled by popular election from the ranks of the legal profession; although the legal fitness of the person for the office is considered as of less importance than his known adherence to the dominant political party.[2]

§ 264. Attorneys and counsellors.

It is also usual, in the superior courts, to have attorneys, advocates or counsel, as assistants. An attorney at law is one who is put in the place, stead or *turn* of another, to manage his matters at law.[3] The law requires that each particular case should be presented to the proper tribunal, agreeably to the rules and forms prescribed for the class of cases to which it belongs; and since it is hardly possible that all persons alike can be skilled in the law and the rules of its application, it is doubtless proper that there should be, in every community, a number who make the study and practice of the law their special vocation and profession, and who are therefore able to counsel such as incline to litigation. Some excellent people there seem to be, who look upon lawyers as the pests of society: unmindful of the fact, perhaps, that to that very body of men, they owe that security of life, liberty and property, which they so happily enjoy, by means of a science, too, which, to have cherished, cultivated, and, in a high degree, to have perfected, is the honor and glory of the profession of the law. A court comprised of the most distinguished jurists will be liable to make contradictory decisions, with-

[1] 3 Bl. Com. 26.

[2] Nor is the selection of a judge, in this country, with reference to his political creed, to be wholly condemned. For his exposition and application of the law, upon all political questions, must favor the one or the other of those theories and constructions of our organic law, to which our attention has formerly been directed; and it may be the will of the people, that is, of the sovereign, that the one of those constructions shall be favored to the exclusion of the other.

[3] 3 Bl. Com. 26.

out the aid of an enlightened bar, faithful to their trust; the counsel must present the case to the court, investigate the principles on which it depends, produce authorities, and trace out the analogies of the law, or the court are not responsible for a correct decision. This is most emphatically true under the present organization of our courts.[1] The enlightened part of the bar, are therefore called upon by that attachment to the principles of political and civil liberty, for which the profession have ever been distinguished in all free governments, to be indefatigable in discharging the duties of their high and responsible trust.[2]

§ 265. State courts various

The judicial powers of the states are vested in a variety of tribunals, in supreme courts, courts of errors and appeals, superior courts, chancery courts, circuit and district courts, courts of common pleas, orphan's courts, courts of oyer and terminer, of general sessions of the peace and jail delivery, registers courts, corporation or municipal courts, justices of the peace, and a variety of others.[3] The distribution of the judicial power is hardly the same in any two states of the union. In each of the states, however, a supreme judicial tribunal, a court of last resort, is established by the constitution, for the final decision of all questions arising under the laws of the state. The necessity and design of such a court, in each of the states, cannot but be evident. A variety of courts must lead to a variety of decisions upon the very same points. To preserve the uniformity and harmony of the law, in which consists its authority, the decisions of the inferior courts must be subject to review and correction, by a court of final jurisdiction in cases of error and appeal.

[1] See 2 Penna. Rep. 65.

[2] Chipman on Cont. Introd. p. 10.

[3] The constitution and laws of each state must here be consulted.

## (3 *f b*) OF THE JUDICIAL POWER OF THE FEDERAL COURTS: AND HEREIN, FIRST

### (1 *g e*) OF THE EXTENT OF THAT POWER.

§ 266. Enumerated cases to which it extends.

THE powers which are delegated by the federal constitution, are, as we have seen, all of them specific and enumerated powers. Thus, by that constitution, the judicial power is declared to extend to certain cases therein mentioned; namely,—'to all cases, in law and equity, arising under that constitution, the laws of the United States, and treaties made or which shall be made under their authority; to all cases affecting ambassadors, other public ministers, and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more states, between a state and citizens of another state; between citizens of different states; between citizens of the same state claiming lands under grants of different states; and between a state or a citizen thereof, and foreign states, citizens or subjects.'[1]

By this enumeration, all other cases and controversies are excluded from the jurisdiction of the courts of the United States.[2] The jurisdiction of those courts is further limited by the eleventh amendment; which provides that 'The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted *against* one of the United States by citizens of another state, or by citizens or subjects of any foreign state.'

§ 267. The judicial power co-extensive with the laws.

The federal judicial authority, then, as it concerns a given case, should be examined with reference to, first, the *laws* under which the case arises; secondly, the *parties* interested; and thirdly, the *subject-matter* involved.

(1.) If a case arises under the *constitution* or under a *law* or a *treaty* of the United States, no one can doubt that it

[1] Const. U. S. Art. III, § 2.

[2] § 171, *ante*.

ought to fall within the federal judicial authority. If there are such things as political axioms, the proposition, that the judicial power of a government, whether state or federal, should be co-extensive with its laws, may be ranked among the number. But the mere necessity of uniformity in the interpretation of the constitution, laws, and treaties of the United States, plainly requires that the power to interpret them be vested in the federal judiciary.[1]

It is proper to observe, however, that consistently with its delegated authority, the federal judiciary can give no opinion on or interpretation of the federal constitution, laws or treaties, by way of answering or deciding questions arising *outside of a case* before it. It can take no cognizance of any case unless that case assumes the character and form of a *case in law* or *a case in equity*. However important a question may be, and whatever its nature or character, be it legal or political, it can never be authoritatively decided by the federal judiciary, except as it actually arises in a case at law or in equity, which is regularly brought before some federal court whose jurisdiction extends to that particular case.

§ 268. Nature and source of jurisdiction.

The constitution also provides, that 'In all cases affecting ambassadors, other public ministers, and consuls, and those in which a state shall be a party, the supreme court shall have *original* jurisdiction;' and that 'In all other cases before mentioned, the supreme court shall have *appellate* jurisdiction, both as to law and fact, with such exceptions, and under such regulations, as congress shall make.'[2] It is a settled doctrine, that the federal courts have no common law jurisdiction whatever, and that all their powers must be derived from the constitution, or from acts of congress passed in pursuance thereof.[3]

[1] See The Federalist, No. 80, pp. 364, 367; Cohens *v.* Virginia, 6 Wheat. 264.

[2] Const. U. S. Art. III, § 2. See, as to this *appellate* jurisdiction, Cohens *v.* Virginia, 6 Wheat. 264.

[3] Pomeroy's Const. Law, §§ 739 and 759.

§ 269. Parties — Public ministers.

(2.) The jurisdiction of the federal judiciary is also determined, as already seen, by reference to the character of the parties concerned. Thus—

'All cases affecting ambassadors, other public ministers, and consuls,' are subject to the exclusive cognizance of the federal judiciary. Ambassadors and other public ministers are the necessary instruments of international communication, and the representatives of the sovereigns respectively by whom commissioned. They are therefore exempt, by the law of nations as now understood, from the jurisdiction, civil and criminal, of the governments who receive them.[1] Nor can a foreign minister waive his privilege; for it is the privilege of his sovereign who sends him.[2] Even his attendants attached to his person, the effects in his use, the house in which he resides, and his domestic servants, are under his protection and privilege, and equally exempt from the local jurisdiction.[3] But if he be concerned in trade, his property in that trade is liable to seizure, as in the case of another individual. If he openly engage in the commission of crime, he may, from the necessity of the case, be resisted and restrained. There may, in short, be cases, in which his privileges, by the law of nations, must come in question. And as any decision affecting the privileges of public ministers, must involve our public international relations, the power to render such decision should doubtless reside in the federal, and not in the state judiciary.

Consuls, it is true, are not entitled to the privileges of public ministers. But being commissioned by their respective governments, with a view to the protection of commercial interests, and being favored by the law of nations and treaties of commerce, it was thought that the

[1] Persons who infringe the laws of nations by offering violence to the persons of ambassadors and other public ministers, or by being concerned in prosecuting or arresting them, or even their domestic servants, are (under the act of congress of April 30, 1790, secs. 25, 26) liable to punishment, on conviction, by imprisonment, not exceeding three years, and fine, at the discretion of the court.

[2] The United States v. Benner, 1 Baldwin's C. C. 234.

[3] Kent's Com. * 39.

federal judiciary should also have exclusive jurisdiction of all cases affecting them. Nor is the judicial cognizance of 'cases affecting ambassadors, other public ministers, and consuls,' conferred on inferior federal courts. In all such cases, the constitution itself invests the Supreme Court of the United States with original jurisdiction.

§ 270. Other parties.

In cases, also, where either the United States shall be a party; or where a state shall be a party as against another state, or as against citizens of another state, or citizens or subjects of a foreign state; or where a foreign state shall be a party, whether as against a state or a citizen thereof;[1] the propriety of the jurisdiction of the federal judiciary, cannot be questioned: however it may, or may not be, in controversies between citizens of different states; or between citizens of the same state claiming lands under grants of different states; or between citizens of a state, and foreign citizens or subjects, in which three classes of controversies, the state courts also have concurrent jurisdiction.

§ 271. Admiralty jurisdiction.

(3.) The *subject-matter* involved, may also become a criterion of the jurisdiction of the federal courts; that is, where it is properly a subject-matter of *admiralty and maritime* jurisdiction; such as a maritime seizure, or a maritime contract or transaction, or a crime or offence, tort or injury, committed at sea, or on the waters of the coasts, without the body of any county. It has been a question, what were the 'cases of admiralty and maritime jurisdiction' within the meaning of the federal constitution. It is not in the power of congress to enlarge that jurisdiction beyond what was understood and intended by it when the constitution was adopted, because it would be depriving the suitor of the right of trial by jury, which is secured to him by the constitution in suits at common law; and it is well known that in civil suits of admiralty and maritime jurisdiction, the proceedings are according to the course of the civil law, and without jury.[2]

[1] A foreign sovereign may still sue in our state courts. The King of Prussia *v.* Kuepper, 22 Mo. 550.

[2] 1 Kent's Com.* 372.

The admiralty and maritime jurisdiction, intended by the federal constitution, was that which was known and ascertained in our own jurisprudence, as well as in that of the parent state, prior to the adoption of that constitution. It was not an unknown or an unascertainable jurisdiction; although the courts of common law, especially in England, had long contended for a limit to it, not acknowledged by the admiralty civilians; the former contending that it only extended to causes of a maritime nature, to things done on the sea without the body of any county; but the latter asserting their jurisdiction not only over all prizes taken in maritime war, and other things done on the high seas, but also over all maritime contracts, and all torts and injuries committed in ports and havens within the ebb and flow of the tide, and in great streams below the first bridges. The broader jurisdiction was not unknown to the admiralty courts of the states, prior to the adoption of the present constitution; and as the grant is of admiralty and maritime jurisdiction, the jurisdiction claimed by the admiralty courts was probably intended; at all events, is generally well supported by our admiralty decisions.[1]

## (2 *g e*) OF THE SEVERAL COURTS OF THE UNITED STATES.

§ 272. Distribution of the federal judicial power.

THE first section of the third article of the federal constitution is in these words:—'The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the congress may from time to time ordain and establish. The judges, both of the supreme and inferior courts, shall hold their offices during good behavior, and shall, at stated times, receive for their services, a compensation, which shall not be diminished during their continuance in office.'

The distribution of the judicial power, by this section,

[1] See cases reviewed in 1 Kent's Com.* 378 *et seq.;* also, The Moses Taylor, 4 Wallace, 411; The Hine *v.* Trevor, Id. 555; and fully, on this subject, 1 Conkling's Admiralty, ch. I, pp. 1 to 72.

should lead us to consider, first, the Supreme Court; and secondly, the inferior courts of the United States.

§ 273. Supreme Court.

(1.) OF THE SUPREME COURT OF THE UNITED STATES. The constitution, while ordaining this high court, leaves it dependent upon the action of congress for its organization. In this respect, the constitution may possibly be defective. For under its provisions, congress may organize, disorganize and re-organize, not only the inferior courts, but the Supreme Court itself, the final judicial exponent of the organic law;—all which congress may do, at whatever time, and in whatever way, may chance to suit the party in power. If the political complexion of the court is not satisfactory to the dominant party, it is easy to increase the number of the judges, secure the appointment of new ones, such as will yield to party behests, and so obtain the support of the whole judicial power, and the desired interpretation of the constitution.

§ 274. Its organization.

As at present organized, the Supreme Court consists of a chief justice and eight associate justices; any six of whom constitute a quorum.[1] The associate justices have precedence according to the dates of their commissions; or when the commissions of two or more of them bear the same date, according to their ages.[2] In case of a vacancy in the office of chief justice, or of his inability to perform the duties and powers of his office, they devolve upon the associate justice who is first in precedence, until such disability is removed, or another chief justice is appointed and duly qualified, and the same applies to every associate justice who succeeds to the office of chief justice.[3]

§ 275. Its original jurisdiction.

The *original* jurisdiction of the Supreme Court, as formerly observed, is confined to two classes of cases: viz. cases affecting ambassadors, other public ministers, and consuls; and those in which a state shall be a party. And

[1] Act 10th April, 1869, ch. 22, § 1; Revised Statutes of the U. S. § 678.
[2] Revised Statutes of the U. S. § 674.
[3] Id. § 675.

even concerning the cases mentioned, the question has arisen, whether or not that original judisdiction was intended to be exclusive. In the judiciary act of 1789, congress assumed that it was not so intended, and in some of those cases, vested concurrent jurisdiction in the circuit courts.[1] It is clear, however, that congress has no authority to give to the Supreme Court appellate jurisdiction where the constitution has declared that its jurisdiction shall be original, or to give it original jurisdiction where the constitution has declared it shall be appellate.[2] The cases in which the court shall have original jurisdiction, could not have been stated in plainer terms. They are such as may not very frequently occur. In all other cases of federal cognizance, the inferior courts have orignal jurisdiction; and the Supreme Court, only an appellate jurisdiction, with such exceptions and under such regulations as congress shall make.[3] It is therefore the appellate jurisdiction of this court that clothes it with most of its dignity and efficiency, and renders it a constant object of attention

[1] Act of September 24th, 1789, § 13. In which connection, see The United States *v.* Ravara, 2 Dall. 297; Marbury *v.* Madison, 1 Cranch, 137; The United States *v.* Ortega, 11 Wheat. 467.

[2] Marbury *v.* Madison, 1 Cranch, 137. The Judiciary Act, § 13, had authorized the Supreme Court to issue writs of *mandamus* in cases warranted by the principles and usages of law, to any courts appointed by, or persons holding office under, the authority of the United States; but the court was of opinion that the act was unwarranted by the constitution, so far as it authorized the issuing of a *mandamus* in this case, to the secretary of state; because the issuing of the writ in this case would be an exercise of *original* jurisdiction not within the constitution, and congress had not power to give original jurisdiction to the Supreme Court in other cases than those described in the constitution. It followed, that to enable the court to issue a *mandamus*, it must be shown to be an exercise, or necessary to an exercise, of its *appellate* jurisdiction. The case decided, that the official acts of the heads of the executive department, as organs of the president, which are of a political nature, and rest, under the constitution and laws, in executive discretion, are not within judicial cognizance. But when duties are imposed upon such heads, affecting the rights of individuals, and which the president cannot lawfully forbid,—as, for instance, to record a patent, or furnish the copy of a record,—the person, in that case, is the officer of the law, and amenable thereto, in the ordinary course of justice. Id. 170, 171.

[3] Const. U. S. Art. III, § 2.

and solicitude on the part of the governments and the people of the states.[1]

§ 276. Appellate jurisdiction.

'The constitution defines the jurisdiction of none but the Supreme Court. Of that court it is said, after giving it a very limited original jurisdiction, that "in all other cases before mentioned, the Supreme Court shall have appellate jurisdiction both as to law and fact, with such exceptions and under such regulations as the congress may prescribe." This latter clause has been the subject of construction in this court many times, and the uniform and established doctrine is, that congress having by the act of 1789 defined and regulated this jurisdiction in certain classes of cases, this affirmative expression of the will of that body is to be taken as excepting all other cases to which the judicial power of the United States extends, than those enumerated.'[2]

§ 277. Relative to inferior federal courts.

It may, however, in general be said, that the Supreme Court is now invested, by the several acts of congress on the subject with all the powers that can be vested in it, pursuant to the constitution, as a court of last resort.[3] It is not perhaps too much to say, that, generally speaking, its power of revision extends to the final judgments and decrees of all the federal inferior tribunals.[4]

§ 278. Relative to state courts.

In some cases, also, this court may review the final decisions of the highest tribunals of the states. These cases are, in general terms, where is drawn in question the validity of a treaty, statute, or authority of the United States, and the decision is against it; or where is drawn

[1] 1 Kent's Com. *315.

[2] *Per* Mr. Justice Miller, delivering the opinion of the Supreme Court in Murdock *v.* City of Memphis, 20 Wall. 620, and citing Wiscart *v.* Dauchy, 3 Dallas, 321; Durousseau *v.* United States, 6 Cranch. 307; The Lucy, 8 Wallace, 307; *Ex parte* McCardle, 6 Id. 318; s. c. 7 Id. 506.

[3] See Cohens *v.* Virginia, 6 Wheat. 264. See Revised Stats. U. S. §§ 690 to 710.

[4] See, upon this subject, Curtis' Commentaries on the Jurisdiction, etc., of the Courts of the United States.

in question the validity of a statute or authority of any state, on the ground of its repugnancy to the constitution, treaties, or laws of the union, and the decision is in favor of it; or where any title, right, privilege or immunity is claimed under the constitution or any treaty or statute of, or commission or authority under, the United States, and the decision is against it.[1]

[1] Act of Feb. 5, 1867, § 2; 14 Stats. at Large, 385; Rev. Stat. U. S. § 709. The words of the act are these:—'A final judgment or decree in any suit in the highest court of a State, in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision is against their validity; or where is drawn in question the validity of a statute of, or an authority exercised under, any State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of such their validity; or where any title, right, privilege, or immunity is claimed under the Constitution, or any treaty or statute of, or commission held, or authority exercised under, the United States, and the decision is against the title, right, privilege, or immunity specially set up or claimed by either party under such Constitution, treaty, statute, commission, or authority, may be re-examined and reversed or affirmed in the Supreme Court of the United States, upon a writ of error, the citation being signed by the chief justice, or judge, or chancellor of the court rendering or passing the judgment or decree complained of, or by a justice of the Supreme Court of the United States, in the same manner, and under the same regulations, and the writ shall have the same effect as if the judgment or decrees complained of had been rendered or passed in a court of the United States; and the proceeding upon the reversal shall also be the same, except that the Supreme Court may, at their discretion, proceed to a final decision of the same, and award execution or remand the same to an inferior court.'

In 20 Wallace, 592–598, the 25th section of the Judiciary Act of 1789, and the 2d section of the act of 1867, (technically repealing the former, but substantially re-enacting it), are 'juxtaposited *verbatim* in columns;' and on page 595 of the same report, we have the following analysis of the two. 'Thus:

'1st. By the old act, this court could not proceed to final judgment and award execution, except in cases where the cause "had been once remanded before." By the new act, this limitation is omitted, and the court is authorized in all cases at their discretion, to render judgment and award execution.

'2d. By the old law the jurisdiction is vested in cases where is drawn in question the *construction* of any clause of the Constitution, or treaty, or statute, or commission. In the new, we have the use of these other

§ 279. Since 1789, the question of the jurisdiction of the Supreme Court, in the class of cases mentioned, has been constantly before that court, and yet the question is hardly to be considered as finally determined and settled. In a very recent case, that of Murdock *v.* The City of Memphis, Mr. Justice Miller pronounced the opinion of the court, and therein said:—'The twenty-fifth section of the act of 1789 is technically repealed, and the second section of the act of 1867 has taken its place: the new law, embracing all that was intended to be preserved of the old, and omitting what was not so intended, became complete in itself and repealed all other law on the subject embraced within it.'[1] And after a thorough examination of the questions presented, that able and learned judge, speaking for the court, concluded as follows:

'Finally, we hold the following propositions on this subject as flowing from the statute as it now stands:

'1. That it is essential to the jurisdiction of this court over the judgment of a state court, that it shall appear that one of the questions mentioned in the act must have been raised, and presented to the state court.

'2. That it must have been decided by the state court, or that its decision was necessary to the judgment or decree rendered in the case.

words, "or where any right, title, privilege, or immunity is claimed," under the Constitution, etc.

'3d. By the old law it was required that what is called "the federal question" must "appear on the face of the record." In the new, the words making this requisition are omitted.

'4th. By the old law, "no other error could be assigned or regarded as ground of reversal than such as immediately related to the validity or construction of the Constitution, treaties, statutes, commissions, or authorities in dispute." In the new, the words putting this limitation on the jurisdiction, disappear, and make an argument plausible that Congress or the draughtsman of the act had meant to say that if a Federal question once existed in the case, and this court so got jurisdiction of the case, then it was bound to go on and decide every question in it, though these questions were questions of local law, and such as, in numberless cases, the court had decided that, under the old section and in consequence of the now omitted language at the close of it, could not be passed on here.'

[1] 20 Wall. 617.

'3. That the decision must have been against the right claimed or asserted by plaintiff in error under the constitution, treaties, laws, or authority of the United States.

'4. These things appearing, this court has jurisdiction, and must examine the judgment so far as to enable it to decide whether this claim of right was correctly adjudicated by the state court.

'5. If it finds that it was rightly decided, the judgment must be affirmed.

'6. If it was erroneously decided against plaintiff in error, then this court must further inquire, whether there is any other matter or issue adjudged by the state court, which is sufficiently broad to maintain the judgment of that court, notwithstanding the error in deciding the issue raised by the federal question. If this is found to be the case, the judgment must be affirmed without inquiring into the soundness of the decision on such other matter or issue.

'7. But if it be found that the issue raised by the question of Federal law is of such controlling character that its correct decision is necessary to any final judgment in the case, or that there has been no decision by the state court of any other matter or issue which is sufficient to maintain the judgment of that court without regard to the federal question, then this court will reverse the judgment of the state court, and will either render such judgment here as the state court should have rendered, or remand the case to that court, as the circumstances of the case may require.'[1]

[1] 20 Wall. 635, 636. 'It is only upon the existence of certain questions in the case that this court can entertain jurisdiction at all. Nor is the mere existence of such a question in the case sufficient to give jurisdiction—the question must have been decided in the state court. Nor is it sufficient that such a question was raised and was decided. It must have been decided in a certain way, that is, against the right set up under the constitution, laws, treaties, or authority of the United States. The federal question may have been erroneously decided. It may be quite apparent to this court that a wrong construction has been given to the federal law, but if the right claimed under it by plaintiff in error has been conceded to him, this court cannot entertain jurisdiction of the case, so very careful is the statute, both of 1789 and of 1867, to narrow,

§ 280. Inferior U. S. courts.

The inferior federal courts which congress has established pursuant to the constitution, are principally the district and circuit courts of the United States. And with a view to the establishment of these, congress has provided, that California, Connecticut, Delaware, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Minnesota, Nebraska, Nevada, New Hampshire, New Jersey, Oregon, Rhode Island, Vermont, and West Virginia, shall each of them constitute one judicial district;[1] that Arkansas, Florida, Georgia, Illinois, Michigan, Mississippi, Missouri, North Carolina, Ohio, Pennsylvania, South Carolina, Texas, Virginia, and Wisconsin, shall each be divided into two judicial districts; and that Alabama, New York, and Tennessee, shall each be divided into three.[2]

§ 280a. U. S. district courts.

The court for each district, is held by a resident district judge: whose original jurisdiction (concurrent with that of the inferior state courts in very many cases) is now generally extended to all crimes and offences cognizable under the authority of the United States and committed within his district (or districts) or upon the high seas, the punishment of which is not capital;[3] to all suits for penalties and forfeitures incurred under the laws of the United States; to all civil causes of admiralty and maritime jurisdiction; to all suits and proceedings in bankruptcy; to all suits for the redress of injuries to personal rights secured by the constitution and laws of the union; and to a great variety

to limit, and define the jurisdiction which this court exercises over the judgments of the state courts. . . . . The state courts are the appropriate tribunals, as this court has repeatedly held, for the decision of questions arising under their local law, whether statutory or otherwise. And it is not lightly to be presumed that congress acted upon a principle which implies a distrust of their integrity or of their ability to construe those laws correctly.' *Per* Mr. Justice Miller, in Murdock *v.* City of Memphis, 20 Wall. 625, 626.

[1] Rev. Stats. U. S. § 531.

[2] Id. §§ 532 to 550.

[3] Id. § 563.

of judicial proceedings the mere enumeration of which would lead us beyond the scope of this work.[1]

§ 281. U. S. circuit courts.

The judicial districts of the United States are divided among nine circuits: the first circuit including the districts of Rhode Island, Massachusetts, New Hampshire, and Maine; the second, the districts of Vermont, Connecticut, and New York; the third, the districts of Pennsylvania, New Jersey, and Delaware; the fourth, the districts of Maryland, Virginia, West Virginia, North Carolina, and South Carolina; the fifth, the districts of Georgia, Florida, Alabama, Mississippi, Louisiana, and Texas; the sixth, the districts of Ohio, Michigan, Kentucky, and Tennessee; the seventh, the districts of Indiana, Illinois, and Wisconsin; the eighth, the districts of Nebraska, Minnesota, Iowa, Missouri, Kansas, and Arkansas; and the ninth, the districts of California, Oregon, and Nevada.[2]

The chief justice and associate justices of the Supreme Court are allotted among the several circuits by an order of the court.[3] For each several circuit, there is also a resident circuit judge, specially appointed as such, and having the same power and jurisdiction therein as the justice of the Supreme Court allotted to such circuit.[4] Circuit courts are held by the justice of the Supreme Court allotted to the circuit,[5] or by the circuit judge of the circuit, or by the district judge of the district sitting alone, or by any two of the said judges sitting together;[6] and cases may be heard and tried by each of the judges holding a circuit court sitting apart by direction of the presiding justice or judge, who shall designate the business to be done by each.[7]

§ 282.

The *original* jurisdiction of the federal circuit courts

[1] See Rev. Stats. U. S. ch. 3.
[2] Rev. Stats. U. S. § 604.
[3] Id. § 606.
[4] Id. § 607.
[5] Id. §§ 605 and 609.
[6] Id. § 609.
[7] Id. § 611.

(concurrent in many cases with that of the state courts) extends to all suits of a civil nature at common law or in equity, where the matter in dispute, exclusive of costs, exceeds the sum or value of five hundred dollars, and an alien is a party, or the suit is between a citizen of the state where it is brought and a citizen of another state: *provided*, that no circuit court shall have cognizance of any suit to recover the contents of any promissory note or other chose in action in favor of an assignee, unless a suit might have been prosecuted in such court to recover the said contents if no assignment had been made, except in cases of foreign bills of exchange.[1] These courts have also *original* jurisdiction of all suits in equity where the matter in dispute, exclusive of costs, exceeds the sum or value of five hundred dollars, and the United States are petitioners; of all suits at common law where the United States, or any officer thereof suing under the authority of any act of congress, are plaintiffs; of all suits at common law or in equity, arising under any act providing for revenue from imports or tonnage, except civil causes of admiralty and maritime jurisdiction, and seizures on land or on waters not within admiralty and maritime jurisdiction, and except suits for penalties and forfeitures; of all causes arising under any law providing internal revenue, and of all causes arising under the postal laws; of all suits and proceedings for the enforcement of any penalties provided by laws regulating the carriage of passengers in merchant vessels;[2] and, we may say, generally, of all suits respecting the rights of citizens of the United States under the federal laws; and, concurrently with the district courts, of crimes and offences cognizable therein.

These circuit courts moreover have an *appellate* jurisdiction, from all final decrees of the district courts, in causes of equity or of admiralty and maritime jurisdiction, except prize causes, where the matter in dispute exceeds the sum or value of fifty dollars, exclusive of costs.[3] Final judg-

[1] Rev. Stats. U. S. § 629.
[2] Id. § 629.
[3] Id. § 631.

ments of the district courts in civil actions, where the matter in dispute exceeds the sum or value of fifty dollars, exclusive of costs, may also be re-examined, and reversed or affirmed, in the circuit courts holden in the same districts, upon writs of error.[1] But a district judge, sitting in a circuit court, may not give a vote in any case of appeal or error from his own decision, although he may assign the reasons for such decision: provided, that such a cause may, by consent of parties, be heard and disposed of by him when holding a circuit court sitting alone. And when he holds a circuit court with either of the other judges, the judgment or decree in such cases shall be rendered in conformity with the opinion of the presiding justice or judge.[2]

To these circuit courts, also, in many cases, causes may be removed from the state courts, for final determination.[3]

### (3 *c a*) OF THE EXECUTIVE POWER: AND FIRST,

### (1 *f c*) OF THE EXECUTIVE POWERS OF THE STATES.

§ 283. Executive power.

THE EXECUTIVE power, as formerly observed, has for its object, the *execution* of the laws, as prescribed by the legislature, and expounded by the judiciary.

In every state, by its constitution, the supreme executive power is vested in one person, called the governor (though formerly in some of the states, called the PRESIDENT); who is chosen by and from among the body of electors composing the state, for a term varying from one to four years, and by whom, with the advice and consent of the senate, the subordinate executive officers, other than such as are elective, are chosen and appointed.

[1] Rev. Stats. U. S. § 633.

[2] Id. § 614.

[3] Id. §§ 639 to 647. In this connection, it affords me pleasure to refer the profession to the masterly essay by Hon. John F. Dillon, entitled 'Removal of Causes from State Courts to Federal Courts'—just published, at St. Louis, by Messrs. G. I. Jones & Co.

§ 284. Governor.

The power and duties of the state governors, are also prescribed by the state constitutions. The nature of the office of a state governor, as well as his oath, requires him to bear true faith and allegiance to his state,[1] to support and defend the constitution thereof, and generally to see that the laws of the state are duly enforced. To that end he is made commander-in-chief of the military and naval forces of the state,[2] and also of the militia, except when in the actual service of the United States.

§ 285.

By some of the state constitutions, the governor is clothed with all the powers of captain-general, commander-in-chief, and admiral, to be exercised either by himself, or by any chief commander, or other officer or officers, under his authority;[3] and according to Alexander Hamilton, 'it may well be a question, whether those constitutions, in particular, do not, in this instance, confer larger powers upon their respective governors, than could be claimed by a president of the United States.'[4]

## (2 *f c*) OF THE EXECUTIVE POWERS OF THE UNITED STATES.

§ 286. Mode of electing the president.

THE executive department of the federal government, next claims our attention. And here I shall briefly consider, first, the creation of the office, and the election, of president; secondly, the qualifications required for the office; and thirdly, the powers and duties of the office.

(1.) First, then, concerning the creation of the office, and the election, of president; the constitution of the union contains the following provisions:

'The executive power shall be vested in a president of

[1] See Const. Mass. Amend. Art. 6; New Hamp. tit. Oaths and Subscriptions, etc.

[2] See *ante* Nos. 63 and 64 of the General Form of State Constitution.

[3] See Const. Mass. Pt. II. Chap. II, Sec. I, Art. 7; Const. N. H. tit. Executive Power.

[4] The Federalist, No. 69, p. 318.

the United States of America. He shall hold his office during the term of four years, and, together with the vice-president, chosen for the same term, be elected as follows:

'Each state shall appoint, in such manner as the legislature thereof may direct, a number of electors, equal to the whole number of senators and representatives to which the state may be entitled in congress: but no senator or representative, or person holding an office of trust or profit under the United States, shall be appointed an elector.[1]

'The electors shall meet in their respective states, and vote by ballot for president and vice-president, one of whom, at least, shall not be an inhabitant of the same state with themselves; they shall name in their ballots the person voted for as president, and in distinct ballots the person voted for as vice-president: and they shall make distinct lists of all persons voted for as president, and of all persons voted for as vice-president, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the president of the senate; the president of the senate shall, in the presence of the senate and house of representatives, open all the certificates, and the votes shall then be counted: the person having the greatest number of votes for president, shall be the president, if such number be a majority of the whole number of electors appointed; and if no person have such a majority, then from the persons having the highest numbers, not exceeding three on the list of those voted for as president, the house of representatives shall choose immediately by ballot, the president. But in choosing the president, the votes shall be taken by states, the representation from each state having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the states, and a majority of all the states shall be necessary to a choice. And if the house of representatives shall not choose a president whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the vice-president shall act as president, as in the case of

[1] Const. U. S. Art. II, § 1.

the death or other constitutional disability of the president.

'The person having the greatest number of votes for vice-president, shall be the vice-president, if such number be a majority of the whole number of electors appointed; if no person have a majority, then from the two highest numbers on the list, the senate shall choose the vice-president; a quorum for the purpose shall consist of two-thirds of the whole number of senators, and a majority of the whole number shall be necessary to a choice.[1]

'Congress may determine the time of choosing the electors, and the day on which they shall give their votes; which day shall be the same throughout the United States.

'In case of the removal of the president from office, or of his death, resignation, or inability to discharge the powers and duties of the said office, the same shall devolve on the vice-president, and congress may by law provide for the case of removal, death, resignation or inability, both of the president and vice-president, declaring what officer shall then act as president, and such officer shall act accordingly, until the disability be removed, or a president shall be elected.

'The president shall, at stated times, receive for his services, a compensation, which shall neither be increased nor diminished during the period for which he shall have been elected, and he shall not receive within that period any other emolument from the United States or any of them.'[2]

§ 287. The foregoing are the provisions of the constitution concerning the creation of the office, and the election of president; and in most respects they seem too plain to admit of comment or explanation. It is worthy of notice, however, that the president is elected, not by the votes of the people at large, but by as many bodies of presidential electors as there are states in the union: 'each state appointing, in such manner as the legislature thereof may direct, a number of electors, equal to the whole number of senators and representatives to which the state may be

[1] Const. U. S., Amendments, Art. XII.
[2] Id. Art. II, § 1.

entitled in congress.' The presidential electors representing a state, may vary in number from three to thirty; and these *may* be appointed, in the absence of any provision of the state constitution to the contrary, without any reference to a popular vote. The framers of the federal constitution were not unmindful of the possible dangers of popular elections involving the people of a great continent in the most exciting contests. They deemed it 'peculiarly desirable to afford as little opportunity as possible to tumult and disorder. This evil was not least to be dreaded in the election of a magistrate who was to have so important an agency in the administration of the government. But the precautions so happily concerted in the system under consideration,' seemed to them to 'promise an effectual security against this mischief.' They thought that 'the choice of *several*, to form an intermediate body of electors, much less apt to convulse the community with extraordinary or violent movements, than the choice of *one*, who was himself to be the final object of the public wishes.' And that, 'as the electors, chosen in each state, were to assemble and vote in the state in which they were chosen, their detached and divided situation would expose them much less to heats and ferments that might be communicated from them to the people, than if they were all to be convened at one time, in one place.'[1]

§ 288. Qualifications for president.

(2.) Secondly, as to the qualifications required for the office of president. 'No person, except a natural born citizen, or a citizen of the United States at the time of the adoption of the constitution, shall be eligible to the office of president [or vice-president]; neither shall any person be eligible to that office, who shall not have attained to the age of thirty-five years, and been fourteen years a resident within the United States.'[2]

[1] See The Federalist, No. 68.

[2] It will be observed that *citizenship of the United States*, was not for the first time established by the present federal constitution; it was originally a result of the old articles of confederation; and under those articles, therefore, but not under the present constitution, it was possible that the first president of the United States should have been chosen

'Before he enter on the execution of his office, he shall take the following oath or affirmation:

'I do solemnly swear (or affirm) that I will faithfully execute the office of president of the United States, and will, to the best of my ability, preserve, protect and defend the constitution of the United States.'[1]

§ 289. Powers of president.

(3.) Thirdly and lastly, concerning the powers and duties of the president. The clauses of the constitution relating to this head, are the following:—

'The president shall be commander-in-chief of the army and navy of the United States, and of the militia of the several states, when called into the actual service of the United States; he may require the opinion, in writing, of the principal officer in each of the executive departments, upon any subject relating to the duties of their respective offices; and he shall have power to grant reprieves and pardons for offences against the United States, except in cases of impeachment.

'He shall have power, by and with the advice and consent of the senate, to make treaties, provided two-thirds of the senators present concur; and he shall nominate, and by and with the advice and consent of the senate, shall appoint, ambassadors, other public ministers, and consuls, judges of the Supreme Court, and all other officers of the United States whose appointments are not herein otherwise provided for, and which shall be established by law; but the congress may by law vest the appointment of such inferior officers, as they think proper, in the president alone, in the courts of law, or in the heads of departments.

'The president shall have power to fill up all vacancies that may happen during the recess of the senate, by grant-

from among many '*natural-born citizens*' *of the United States* which had 'attained to the age of thirty-five years before the first presidential election. See § 162, *ante*, where I have referred to the wonderful (and seemingly original) discovery of a late writer on constitutional law, that, by the old articles of confederation, 'there is no *status* of United States citizenship created or recognized.'

[1] Const. U. S. Art. II, § 1.

ing commissions which shall expire at the end of the next session.

'He shall from time to time give to the congress information of the state of the union, and recommend to their consideration such measures as he shall judge necessary and expedient; he may, on extraordinary occasions, convene both houses, or either of them, and in case of disagreement between them, with respect to the time of adjournment, he may adjourn them to such time as he shall think proper; he shall receive ambassadors and other public ministers; he shall take care that the laws be faithfully executed, and shall commission all the officers of the United States.'[1]

'Every bill which shall have passed the house of representatives and the senate, shall, before it become a law, be presented to the president of the United States; if he approve, he shall sign it; but if not, he shall return it, with his objections, to that house in which it shall have orginated, who shall enter the objections at large on their journal, and proceed to reconsider it.'[2]

§ 290. The president as commander-in-chief.

'The president shall be commander-in-chief of the army and navy of the United States, and of the militia of the several states when called into the actual service of the United States.'

'The propriety of this provision,' in the words of The Federalist, 'is so evident, and it is, at the same time, so consonant to the precedents of the state constitutions in general, that little needs to be said to explain or enforce it. Even those of them which have, in other respects, coupled the chief magistrate with a council, have for the most part concentrated the military authority in him alone. Of all the cares or concerns of government, the direction of war most peculiarly demands those qualities which distinguish the exercise of power by a single hand. The

[1] Const. U. S. Art. II, §§ 2, 3.

[2] Id. Art. I, § 7. The same also as to 'every order, resolution, or vote to which the concurrence of the senate and house of representatives may be necessary (except on a question of adjournment.)' Id. See § 297, *post*.

direction of war implies the direction of the common strength; and the power of directing and employing the common strength, forms an usual and essential part in the definition of the executive authority.'[1]

§ 291. Power as to state militia.

'The president shall be commander-in-chief of the militia of the several states, when *called* into the actual service of the United States.' For the word *called*, we are here, I apprehend, to read *mustered*. The constitution, as we have formerly seen, gives to congress power 'To *provide* for *calling* forth the militia to execute the laws of the union, suppress insurrections, and repel invasions.'[2] In pursuance of this power, congress, by act of 28th February, 1795, vested authority in the president to *call* forth the militia, for the purposes mentioned; and under this and other acts, he has the exclusive power to judge when any of the exigencies arises, in which his authority to make such call should be exerted.[3] But though the president make a *call* for the militia of a state, which it seems he may do by directing his orders to the governor of the state, the militia still remain completely subject to state jurisdiction, till actually *mustered* into the service of the United States:[4] until after such *muster*, they are subject to the order of the governor of the state, as their commander-in-chief, by virtue of the state constitution.[5] It may, therefore, be a question whether, in making the neglect or refusal of a state officer, to obey the orders of the president, an offence against the United States, punishable by a United States court martial, congress has or has not transcended the limits of the constitution. That 'the people,' in ratifying the federal constitution, designed to place themselves, as state militia, or in any other character, so completely at

[1] The Federalist, No. 74, p. 341.

[2] Const. U. S., Art. I, § 8. *Ante*, § 289.

[3] Martin *v.* Mott, 12 Wheat. 19. The governments of Connecticut and Massachusetts, however, prior to this decision, held to the contrary doctrine. See 1 Kent's Com. * 262–265.

[4] Houston *v.* Moore, 5 Wheat. 1. *Ante*, § 240. As to the power of congress in this particular, see *ante*, §§ 239–242.

[5] See General Form of State Constitution, *ante*, p. 93.

the *will* of the president, is hardly possible. That such was their intention, is clearly disproved by their state constitutions, which have always made the chief executives of the states the commanders-in-chief of the militia of the states, as well as denied by several of the amendments to the federal constitution. Long, I trust, shall we look in vain for any *delegation of power*, in our constitutions, by which the lives, liberties, and fortunes of our people, are placed at the mercy of courts martial, or made the sport of military chiefs and military commissions.

§ 292. 'The president may require the opinion, in writing, of the principal officer in each of the executive departments, upon any subject relating to the duties of their respective offices.'[1]

Concerning this clause, we shall only observe, in the language of Alexander Hamilton, that it is 'a mere redundancy in the plan; as the right for which it provides would result of itself from the office.'[2]

§ 293. Pardoning power of president. 'The president shall have power to grant reprieves and pardons for offences against the United States, except in cases of impeachment.'[3]

The pardoning power, by which the regular course of the law is suspended in particular cases, is usually vested in the chief executive; though partaking, perhaps, not only of the legislative, but also of the judicial, functions. The policy of this disposition of the power is easily defended. 'Humanity and good policy conspire to dictate, that the benign prerogative of pardoning should be as little as possible fettered or embarrassed. The criminal code of every country partakes so much of necessary severity, that without an easy access to exceptions in favor of unfortunate guilt, justice would wear a countenance too sanguinary and cruel. As the sense of responsibility is always strongest, in proportion as it is undivided, it may be inferred, that a single man would be most ready to at-

[1] Const. U. S. Art. II, § 2.
[2] The Federalist, No. 74, p. 341.
[3] Const. U. S. Art. II, § 2.

tend to the force of those motives which might plead for a mitigation of the rigor of the law, and be least apt to yield to considerations which were calculated to shelter a fit object of its vengeance. The reflection that the fate of a fellow creature depended on his *sole fiat*, would naturally inspire scrupulousness and caution; the dread of being accused of weakness or connivance would beget equal circumspection, though of a different kind. On the other hand, as men generally derive confidence from their number, they might often encourage each other in an act of obduracy, and might be less sensible to the apprehension of censure for an injudicious or affected clemency. On these accounts, one man appears to be a more eligible dispenser of the mercy of government, than a body of men.'[1]

§ 294. Treaty making power.

'The president shall have power, by and with the advice and consent of the senate, to make treaties, provided two-thirds of the senators present concur.'[2] The treaty-making power, is, unquestionably, in all governments, a power of great magnitude and importance, and possibly liable, like all other powers of a political nature, to perversion and abuse. It must, however, reside somewhere; and though of a legislative character, no suggestion has yet been made, concerning its disposition, which proposes a wiser or better plan than that of the framers of the constitution. 'The security essentially intended against corruption and treachery in the formation of treaties, is to be sought for in the numbers and characters of those who are to make them. The joint agency of the chief executive magistrate of the union, and of two-thirds of the members of a body selected by the collective wisdom of the legislatures of the several states, is designed to be the pledge for the fidelity of the federal councils in this particular.'[3]

It was, as we have seen, the plan of the framers of the

[1] The Federalist, No. 74. Hamilton. As to whether there should not have been an exception also of cases of *treason*, see the same number.

[2] Const. U. S. Art. II, § 2.

[3] The Federalist, No. 66. On this power, see also Nos. 64 and 75.

federal constitution, to vest in the federal government all those powers of a general nature, the exercise of which must equally affect the interests of every member of the union; and, at the same time, to leave each state in full possession of all such powers as related to its internal government.[1] By no other plan, indeed, was a union of states as such a possible thing.[2] The exercise of the treaty-making power, was therefore vested in the government of the union, and no state could afterward enter into any treaty, alliance, confederation, agreement or compact, with another state, or with a foreign power.[3] But the interests of the states were kept in view, and fully secured, by vesting the power in the president *and senate*, who are, by the constitution itself, made the immediate representatives of the states, chosen by the states themselves, and not by the people at large.

The power of the president, in this particular, must of course exceed the power of any of the state executives. 'But this arises naturally from the exclusive possession by the union of that part of the sovereign power which relates to treaties. If the confederacy were to be dissolved, it would become a question, whether the executives of the several states were not solely invested with that delicate and important prerogative.'[4]

§ 295 Appointing power of president.

'The president shall nominate, and by and with the advice and consent of the senate, shall appoint ambassadors, other public ministers and consuls, judges of the Supreme Court, and all other officers of the United States whose appointments are not otherwise provided for in the constitution, and which shall be established by law; but congress may by law vest the appointment of such inferior officers, as they think proper, in the president alone, in the courts of law, or in the heads of departments. The president shall have power to fill up all vacancies that may happen during the recess of the senate, by granting commissions which shall expire at the end of their next session.'[5]

[1] See *ante*, § 112. [2] *Ante*, § 16. [3] Const. U. S. Art. I, § 10.
[4] The Federalist, No. 69, p. 319. Hamilton.
[5] Const. U. S. Art. II, § 2.

All officers of the federal government, whose appointments are not provided for by the constitution itself, or vested by act of congress in the courts of law or the heads of departments, are to be *nominated*, and with the advice and consent of the senate, *appointed*, by the president. An almost unlimited number of appointments to office are thus placed at the disposal of the president, by which he may, if he will, attach to his interests as many influential and efficient adherents, and, under circumstances favorable to unlimited power, thus make himself master of the fortunes of millions.

There can of course be no exertion of *choice* on the part of the senate. They may defeat one choice of the executive, and oblige him to make another; but they cannot themselves *choose*—they can only ratify or reject the choice he may have made. They may even entertain a preference for some other person, at the very moment they are assenting to the one proposed; because there may be no positive ground of opposition to him; and they cannot be sure, if they withhold their assent, that the subsequent nomination will fall upon their favorite, or upon any other person in their estimation more meritorious than the one rejected. Thus it can hardly happen, that the majority of the senate will feel any other complacency towards the object of an appointment, than such as the appearances of merit may inspire, and proofs of the want of it destroy.[1] Our foreign as well as our home relations and policy, are thus to be shaped by the president.

The power of appointment,—the most dangerous of all powers, in the hands of a single ambitious executive,—must of course reside somewhere. Perhaps, however, the dangers to be apprehended from the abuse of so great a power, especially in times peculiarly favorable to imperial rule, might have been greatly diminished, if not wholly avoided, by vesting the power completely in the senate, so far as it relates to the appointment of other than dis-

[1] The Federalist, No. 66. This appointing power of the president is defended by The Federalist, weakly however, in Nos. 76 and 77.

trict officers, and in the people of each particular district, so far as it concerns the choice of district officers.[1]

§ 296. Other powers.

'The president shall, from time to time, give to congress information of the state of the Union, and recommend to their consideration such measures as he shall judge necessary and expedient; he may, on extraordinary occasions, convene both houses, or either of them, and in case of disagreement between them with respect to the time of adjournment, he may adjourn them to such time as he shall think proper; he shall receive ambassadors and other public ministers; he shall take care that the laws be faithfully executed, and shall commission all the officers of the United States.'[2]

With the exception of the *veto* power, these are the remaining powers of the president; and these are so plainly expressed that they speak for themselves.

§ 297. President's veto.

The *veto* power, as it is termed, is conferred by the following clause of the constitution:—'Every bill which shall have passed the house of representatives and the senate, shall, before it become a law, be presented to the president of the United States; if he approve, he shall sign it, but if not, he shall return it, with his objections, to that house in which it shall have originated, who shall enter the objections at large on their journal, and proceed to re-consider it. If after such re-consideration, two-thirds of that house shall agree to pass the bill, it shall be sent, together with the objections, to the other house, by which it shall likewise be re-considered, and if approved by two-thirds of that house, it shall become a law. But in all such cases the votes of both houses shall be determined by yeas and nays, and the names of the persons voting for

[1] Nothing shows so much THE ANTI-REPUBLICAN SPIRIT OF THE TIMES, as the fact alone that the grand army of tax assessors and collectors, created by congressional legislation, have not been made elective by the people of their respective districts. See The Federalist, No. 36, p. 157 *et seq.* Even though to have made them so elective, might have required a change of the constitution, *that* could have been no objection with a party ready to change it on every occasion to suit their *partisan* views.

[2] Const. U. S. Art. III, § 3.

and against the bill shall be entered on the journal of each house respectively. If any bill shall not be returned by the president within ten days (Sundays excepted) after it shall have been presented to him, the same shall be a law, in like manner as if he had signed it, unless the congress by their adjournment prevent its return, in which case it shall not be a law. Every order, resolution, or vote to which the concurrence of the senate and house of representatives may be necessary (except on a question of adjournment) shall be presented to the president of the United States; and before the same shall take effect, shall be approved by him, or being disapproved by him, shall be re-passed by two-thirds of the senate and house of representatives, according to the rules and limitations prescribed in the case of a bill.'[1]

§ 298. Nature and objects of this power.

It will be observed, that the president has not an absolute negative concerning congressional legislation; he can only require that a bill be re-passed by two-thirds of both houses, before it shall have the effect of a law.

'The propensity of the legislative department to intrude upon the rights, and to absorb the powers, of the other departments, has been already more than once suggested; the insufficiency of a mere parchment delineation of the boundaries of each, has also been remarked upon; and the necessity of furnishing each with constitutional arms for its own defence, has been inferred and proved. From these clear and indubitable principles, results the propriety of a negative, either absolute or qualified, in the executive, upon the acts of the legislative branches. Without the one or the other, the former would be absolutely unable to defend himself against the depredations of the latter. He might gradually be stripped of his authorities by successive resolutions, or annihilated by a single vote. And in the one mode or the other, the legislative and executive powers might speedily come to be blended in the same

[1] Const. U. S. Art. 1, § 7. The Consitution of Massachusetts (Pt. II, ch. 1, § 1, Art. 2.) seems to have furnished the original of this section. See The Federalist, No. 69, pp. 316, 317.

hands. If even no propensity had ever discovered itself in the legislative body, to invade the rights of the executive, the rules of just reasoning and theoretic propriety would of themselves teach us, that the one ought not to be left at the mercy of the other, but ought to possess a constitutional and effectual power of self-defence.

'But the power in question has a further use. It not only serves as a shield to the executive, but it furnishes an additional security against the enaction of improper laws. It establishes a salutary check upon the legislative body, calculated to guard the community against the effects of faction, precipitancy, or of any impulse unfriendly to the public good, which may happen to influence a majority of that body. The propriety of a negative has, upon some occasions, been combatted by an observation, that it was not to be presumed a single man would possess more virtue and wisdom than a number of men; and that unless this presumption should be entertained, it would be improper to give the executive magistrate any species of control over the legislative body. But this observation, when examined, will appear rather specious than solid. The propriety of the thing does not turn upon the supposition of superior wisdom or virtue in the executive; but upon the supposition that the legislative will not be infallible; that the love of power may sometimes betray it into a disposition to encroach upon the rights of the other members of the government; that a spirit of faction may sometimes pervert its deliberations; that impressions of the moment may sometimes hurry it into measures which itself, on mature reflection, would condemn.'[1]

§ 299. 'The primary inducement to conferring the power in question upon the executive is, to enable him to defend himself: the secondary is to increase the chances in favor of the community against the passing of bad laws, through haste, inadvertence or design. The oftener a measure is brought under examination, the greater the diversity in the situations of those who are to examine it, the less

[1] The Federalist, No. 73.—Hamilton.

must be the danger of those errors which flow from want of due deliberation, or those mis-steps which proceed from the contagion of some common passion or interest. It is far less probable that culpable views of any kind should infect all the parts of the government at the same moment and in relation to the same object, than that they should by terms govern and mislead every one of them.

'It may perhaps be said that the power of preventing bad laws includes that of preventing good ones; and may be used to the one purpose as well as the other. But this objection will have little weight with those who can properly estimate the mischiefs of that inconstancy and mutability in the laws, which form the greatest blemish in the character and genius of our governments. They will consider every institution, calculated to restrain the excess of law-making and to keep things in the same state in which they may happen to be at any given period, as much more likely to do good than harm; because it is favorable to greater stability in the system of legislation. The injury which may possibly be done by defeating a few good laws, will be amply compensated by the advantage of preventing a number of bad ones.

'Nor is this all. The superior weight and influence of the legislative body in a free government, and the hazard to the executive in a trial of strength with that body, afford a satisfactory security that the negative would generally be employed with great caution; and that in its exercise, there would oftener be room for a charge of timidity than of rashness. In the case for which it is chiefly designed, that of an immediate attack upon the constitutional rights of the executive, or in a case in which the public good was evidently and palpably sacrificed, a man of tolerable firmness would avail himself of his constitutional means of defence, and would listen to the admonitions of duty and responsibility. I speak now with an eye to a magistrate possessing only a common share of firmness. There are men, who, under any circumstances, will have the courage to do their duty at every hazard.'[1]

[1] Id. pp. 388–389: This subject is fully examined by Hamilton in

## (3 *d*) OF THE RIGHT OF POLITICAL DOMAIN.

§ 300. Eminent domain of the states.

Having considered the sovereign rights of political existence and of political sovereignty, and shown in whom those rights inhere, it remains to be seen in whom is vested the sovereign right of political domain; whether in the states, or in the union of the states.

The states are united, as we have seen, by a written constitution and a government founded therein, to which the PEOPLE of each state, as a self-constituted, self-organized, and self-governing political community or state, became a party by their own free act.[1] But that constitution contains no grant or delegation of power to the government of the United States, or to any branch or department thereof, affecting the sovereign proprietary right to the territory of the states. That right must threfore remain the right of the people of each state.[2] The Supreme Court of the United States, in its expositions of the federal constitution, has therefore uniformly held, that, from the time the people of any state resumed the powers of sovereignty, the prerogatives and regalities which before belonged to either the Crown or the Parliament of Great Britain, became immediately and rightfully vested in them, together with the absolute title to all the territory, and to all the navigable waters and the soils under them, within the

his usual masterly manner.—See the number referred to, and also No. 71, p. 329, where his argument is sufficiently strong to justify an *absolute* negative upon the legislative body. On the tendency to usurpation by the legislative power, see also No. 48, by Madison: and further, on the *veto* power, Id. No. 51, p. 240.

[1] 'The *ratification of the Conventions of nine States* shall be sufficient for the establishment of this Constitution between the States so ratifying the same.' Const. U. S. last clause. See the ordinances of these conventions, §§ 85 to 86, *ante*. 'No political dreamer was ever wild enough to think of breaking down the lines which separate the States and of compounding the American people into one common mass. Of consequence, when they act, they act in their States. . . . . *From these Conventions, the Constitution derives its whole authority.*' Chief Justice Marshall, in McCulloch *v.* Maryland, 4 Wheat. 316; 4 Pet Cond. Rep. 471. See p. 289, *ante*.

[2] Const. U. S. Amendments, Art. x.

jurisdiction of their state; and that they yet hold in right of their sovereignty, the absolute property in, and dominion over, all the territory within the bounds and limits of their state, with the right to dispose of the title to any part thereof, subject only to the rights of navigation, for the purposes of commerce, over the waters of the state.[1]

§ 301. As formerly remarked, the title to the territories acquired since the Revolution, was originally vested in the United States; in trust, nevertheless, for such of the people of the several states as should settle therein, form new states, and in the capacity of states, be admitted into the federal union.[2] And as each state legislature is generally empowered by its constitution, to make all laws at discretion, so long as they be not repugnant to that constitution, it follows of course, that the government of a state is practically clothed with all the rights of eminent domain, within the jurisdiction of the state, and may grant its lands to whom it pleases, and subject to any conditions it may choose to impose. 'That the legislature of a state, unless restrained by its own constitution, possesses the power of disposing of the unappropriated lands within its own limits, in such manner as its own judgment shall dictate, is a proposition not to be controverted.'[3]

§ 302. Public lands of the United States

By the federal constitution, congress has power to dispose of, and make all needful rules and regulations respecting, the territory or other property belonging to the United States.[4] And it is generally understood that this power extends to the disposal of all public lands the title to which is held by the United States in trust for the people of the several states. For the disposal of those lands is unquestionably a matter of common and national con-

[1] Martin *et al. v.* Waddell, 16 Pet. 410, 416; Weber *v.* Harbor Commissioners, Sup. Ct. U. S., Central Law Journal, Vol. I, No. 41, p. 518. See p. 87, *ante*, No. 88.

[2] Weber *v.* Harbor Commissioners, *sup.*

[3] Marshall, Chief Justice, in Fletcher *v.* Peck, 6 Cranch, 87; 2 Pet. Cond. 317.

[4] Const. U. S. Art. IV, § 3, 2.

cern, which could not be subject to the jurisdiction of any one member of the union.

It is no part of the design of this work, however, to treat of the law of eminent domain, or of the system of law respecting the public lands. The design was to show the foundation, nature and character, of our American system of government, and the present danger to which that system is exposed.

§ 303. Conclusion.

We have now ascertained in whom the rights of political existence, political sovereignty, and political domain, are vested by our constitutional system: a system productive of an almost endless division, enumeration, and distribution of the powers of government, and one that might seem to invite the objection that sooner or later it must of itself engender confusion, and become unintelligible to all but those who make it their study and profession. To this objection, however, it should be an all-sufficient answer, that in proportion as the laws of a people are few and simple, the powers of the government, and the rights of the citizen, must remain undefined, unfixed and uncertain, and in the same proportion, political and civil liberty and personal security, must be at an end. The inconveniences arising from different laws and regulations in different states upon the same subject-matters, have, without doubt, led many good people to wish for *uniform laws* upon *all* subjects: they seeming to forget that the POWER TO ENFORCE UNIFORMITY IN ALL THINGS, is in its very essence despotic and imperial, and destructive of all forms of self-government. May it be possible that our people are blinded to this truth! Will they not see that UNIFORMITY IS DEATH TO LIBERTY! The rule of my house is to be enforced as the rule of yours, and the rule of yours as the rule of mine; and because you live in the fog and must carry a lamp by day and by night, I must also carry a lamp, although I live in the blaze of the sun. This is not conformable to the laws of nature or the laws of the physical world,[1] nor is it consistent with the *fundamental princi-*

[1] See § 9, pp. 5–6, *ante*.

*ples* of our system of government. We have seen that our system ultimately rests on two principles, INDIVIDUAL SELF-GOVERNMENT, and COMMON CONSENT; INDIVIDUALITY and CO-OPERATION. These principles are as natural and eternal as nature herself. But nature herself can be law for intelligent beings only in becoming the meaning and ideality of visible forms. Common consent, in like manner is a myth, unless expressed in words and definite propositions. Thus the COMMON MIND is the COMMON SOVEREIGN only in the form of WRITTEN CONSTITUTIONS. The COMMON CONSENT is therefore expressed in such CONSTITUTIONS; and as it cannot be given without PARTIES CONSENTING, the *status* of the parties is fixed as that of ABSOLUTE SOVEREIGNS; they being the source of power and the crown and support of the system. The system can, therefore, exist and continue only on condition that those parties retain their sovereign power; only so long as the principle and ultimate foundation of the system, that all power is inherent in the people of each state, remains secure and unshaken.[1] Hence the question, and the all-important question: SHALL THE BASIS AND FOUNDATION OF THE SYSTEM BE CHANGED, AND THE SOVEREIGNTY OF THE PEOPLE BE SURRENDERED AS PROOF OF THEIR LOYALTY TO OUR IMPERIAL COURT! This is the question which the SOVEREIGN ASSEMBLIES OF THE PEOPLE are soon to decide.

AMERICANS! However divided by party lines, forget not your trust.

You are the sovereigns of a mighty republic, founded in the wisdom and patriotism of your sires. Under God and your banner, humanity is self-redeemed and liberty is proclaimed to all men.

Shall your place, your power, and your right be usurped, and the sceptre of your might be seized by a treacherous yet trusted hand? Is treason at work and still unsuspected and honored?

Consider, then, the ways of your trusted servants; their perfidious violations of their oaths of fidelity to your

[1] The people of each state, in their state constitution, have always assumed this to be the basis of our system. See pp. 80, 81, 289, *ante*.

sovereign will and organic law; their covert homage to the new pretender to the sovereignty of America, couched in the mystic form of '*the right of citizens of the United States* TO VOTE;' their open denial of your right to determine and decree, by your own constitutions, who shall share in your sovereign deliberations and resolves; their collusive and wasteful appropriations of your public lands; their profligate expenditure of millions extorted by unwise and ruinous taxation—destroying your manufactures, your commerce and trade, and beggaring one-half of your laboring populations; their merciless oppression and spoilation of your once erring brethren, and their contentions for the spoils; their efforts to mask their usurpations and misrule by arousing the demon and rekindling the fires of sectional hate; their greed of gifts, their love of bribes, their schemes and leagues of corruption, and their hatred, contempt and resistance of reforms which you have decreed.

It is for you to say 'Thus far and no farther.' THE SCEPTRE IS STILL IN YOUR HANDS.

It is for you to decide, whether your will, as expressed by yourselves in your sovereign enactments and constitutions for the glory and advancement of the cause of humanity and civilization, or the traitorous schemes of your servants for their own elevation and self aggrandizement, shall be the paramount law of the land.

The people of Rome, at a critical moment, recollected they were legislators, and there was an end of Tarquin.[1]

Americans! Awake to your duty! 'Eternal vigilance is the price of liberty.' Hold the sceptre or all is lost.

[1] Montesquieu Spirit of Laws b. XI c. 12.

# INDEX.

References are made to Sections.


ABANDONMENT, of Sovereignty by 'The People,' 12.
ABSOLUTE RIGHTS, 16–17.
ABSOLUTISM IN GOVERNMENT (See IMPERIAL THEORY), 12.
ALLEGIANCE, '80, 55, 57, 60, 65, 180.
AMENDMENTS, to Federal Constitution, 89.
mode of making, 87–88.
limit to the power of making, 87 *a*, 168.
XIVth and XVth, 89 *a*, 164–172.
partisan Amendments, 88, 198.
ANALYSIS OF THE DIFFERENT FOUNDATIONS OF GOVERNMENT, 11–16.
ANGLO-AMERICAN COLONIES, Political History of, 22–44.
ANNAPOLIS CONVENTION, of 1786, 77.
ARTICLES OF CONFEDERATION, 50–51.
nature and defects of, 63.
revision of, 76–82.
BANKRUPT LAWS, power to enact, 160.
BILL OF RIGHTS, See General Form of State Constitution, 75–76.
BODY POLITIC, what it is, 91.
BOUNDARY-LINE, of State and Federal Powers, 16, 112, 117, 125, 126, 141.
CAROLINAS, THE, Colonial Government of, 25, 26.
CITIZENS, what is meant by, 155, 156.
who are, 156, 165.
CITIZENSHIP, before the Confederation, 62, 157.
of a State, 155–157.
of the United States, 155–157.
origin of, 161–162.
'privileges and immunities' of, 163–172.
confers no right to vote, 163–172.
CIVIL STATE, distinguished from the Political, 91, 155, 156.
COLONIES, History of the American, 22–44.
COMMERCE, power to regulate, 142.
COMMISSIONS, of Delegates to Constitutional Convention, 79.
COMMON CONSENT, Government founded in, 11, 14, 15, 16, 150.
COMMON LAW, confirmation of by the States, 60, 61.
COMPACT, original, of Society, 73–75.

CONGRESS, Colonial, of 1765, 85.
of 1774, 87.
of the Revolution, 45–51.
CONGRESS OF THE UNITED STATES, its Powers Limited, 148.
under XVth Amendment, 171–172.
CONNECTICUT, Colonial Government of, 27.
her Ordinance Ratifying the Constitution, 85 *a*.
CONSTITUTION OF THE UNITED STATES, Original Text of, 81–82.
establishment of, 76–86 *a*.
foundation of, 114.
principle of, 111, 112, 119, 141, 153.
Preamble to, 84, 108–110, 149.
theories of, (See FEDERAL, also IMPERIAL Theory) 101–133.
views of its Framers, 111–128.
CONSTITUTION, of the English Parliament, 192.
CONSTITUTIONS, State, establishment of, 73, 74.
fundamental Principle of, 93, 94, 134.
General Form of, 75–76.
nature of, 73–75.
CONSTITUTIONAL CONSTRUCTION, Fundamental Rule of, 127, 141, 142.
CONSTITUTIONAL CONVENTION, of 1787, 78–83.
CONVENTION, the Annapolis, of 1786, 77.
the General, of the States, of 1787, 78–82.
Political Parties in, 80.
Letter and Resolution of, 83.
difficulties experienced in, 111–112.
DECLARATION OF INDEPENDENCE, by Continental Congress, 48–49.
by Virginia, 43.
DELAWARE, her Ordinance Ratifying the Constitution, 85 *a*.
DEMOCRATS, THE, 152–154.
DOMAIN, of States and United States, 300.
ELECTIONS, Power of Congress concerning, 94 *a*.
ELECTORS, 91–98, 165, 166, 171–180.
compose the States, as Bodies Politic, 91–93.
hold the Paramount Sovereignty, 91–95.
determine their own *Status*, 94–95.
regulations of their Rights, Importance of, 95–99.
sovereign Office and Duty of, 97.
ENGLAND, Constitution of, 192.
FEDERAL CONSTITUTION, (See CONSTITUTION) 81–82.
FEDERAL POWERS, extent of, 117, 145.
construction of, 112, 127, 141, 142.
supremacy of, 143–144.
FEDERAL THEORY, 111–128.
how it defines a State, 19.
contrasted with the Imperial Theory, 101.
necessity of understanding the two Theories, 101.

FEDERAL THEORY, principles of the Federal Theory, 111–118, 117, 119, 134, 135, 141.
advantages of, 121.
as to State Sovereignty, 134–138, 204.
FEDERALIST, THE, 113, 129.
FEDERATIVE PRINCIPLE, 14, 111, 112, 117, 119.
FINAL JUDGMENT, on questions of sovereignty, 16, note, 146–150.
GEORGIA, Colonial Government of, 25.
her Ordinance Ratifying the Constitution, 85 *d*.
GOVERNMENT, Analysis of the Different Foundations of, 11–16.
a means to a definite end, 88, 52.
founded in Common Consent, 11–14.
implied, 11, 12, 17.
expressed—written, 11, 12.
Sovereignty of, 12, 87 *a*, 87 *b*, 140.
resumable by the People, 39, 40, 131, 150.
United States, original commencement of, 86.
GOVERNMENTS, Colonial, 24–27.
HAMILTON, Alexander, his Theory, 118–129, 130, 143.
IMPERIAL THEORY (See FEDERAL Theory), 101–111, 129, 130, 133.
general statement of, 102, 129.
grounds of, 108–111.
idea of its original proponents, note to 110.
its method and object, 108.
advantages of, 106.
how it defines a State, 19, 102.
its refutation, 104–111, 133.
its establishment, 169, 171 to 180.
IMPLIED POWERS, of Government, 11, 12, 17.
INALIENABLE RIGHTS (See SELF-GOVERNMENT), note to 16, 94, 136, 150, 167, 169
INAUGURATION OF U. S. GOVERNMENT, 86.
INDEPENDENCE, Declaration of, by Continental Congress, 48–49.
by Virginia, 48.
INDIVIDUAL LIBERTY, how far alienable, note to 16.
JAY, John, his Theory of the Constitution, note to 110, 129, 130, 140.
JUDGMENT, FINAL, on Political Questions, note to 16, 146–150.
JUDICIAL POWERS, of U. S. Supreme Court, 147.
JURISDICTION, of Federal Government, 146–150.
LEGISLATIVE POWER, of the People, 69–72.
of Government, encroaching nature of, 146 *a*.
LETTER AND RESOLUTION of the Constitutional Convention, 88.
LIMITATIONS, CONSTITUTIONAL, on Government, 178.
on Powers of Congress, 126, 145.
on Federal Government, 126, 145–150.
on Power to amend Constitution, 87 *a*, 87 *b*, 164–172.
MADISON, James, his Theory of the Constitution, 113–118, 129, 130.
MAJORITIES, power of, limited, note to 16, 87 *b*, 136, 150.

MARYLAND, Colonial Government of, 26.
her Ordinance Ratifying the Constitution, 85 *g*.
MARSHALL, Chief Justice, his Theory of Constitution, 60, 131–132, 142, 204.
MASSACHUSETTS, Colonial Government of, 25.
action of, in 1768 and 1774, 41.
her Ordinance Ratifying the Constitution, 85 *f*.
MONTESQUIEU, Spirit of Laws, 9, 111, 118, 119, 120.
NATION, definitions or descriptions of a, 18 *a*, 20.
distinguished from State, 20.
the word formerly unknown to our Constitutions, 20.
NATIONAL REPUBLICANS, THE, 154.
NATIONAL THEORY (See IMPERIAL Theory), 102, note to 110.
NATIONALS, THE, 80, 151–152.
NATURALIZATION LAWS, power to enact, 157–161.
NECESSITY, in Politics, 21.
of Political Parties, 153–154.
NEW ENGLAND COLONIES, Governments of, 25.
NEW HAMPSHIRE, her Ordinance Ratifying the Constitution, 85 *i*.
NEW JERSEY, Colonial Government of, 25, 26.
her action in 1774–1776, 42.
her Ordinance Ratifying the Constitution, 85 *c*.
NEW YORK, Colonial Government of, 25.
her Ordinance Ratifying the Constitution, 85 *l*.
NORTH CAROLINA, her Ordinance Ratifying the Constitution, 85 *m*.
OATH to support Constitution, 144.
OFFICERS, governmental, note to 182.
ORDINANCES of the States, Ratifying the Constitution, 85–86.
ORIGINAL COMPACT OF SOCIETY, 73–75.
PARTIES, POLITICAL, 80, 151–154.
origin of, 152.
necessity of, 153–154.
amendments by to Constitution, 88, 89 *a*.
PARTIES, SOVEREIGN, to the Constitution, 104, 105, 114, 117, 120, 128.
PEOPLE, THE, (See ELECTORS), who are, 84, 91–93.
sovereignty of, inalienable, note to 16, 87 *a*, 87 *b*, 94, 169.
determine their own STATUS, 94–95.
PENNSYLVANIA, Colonial Government of, 26.
her Ordinance Ratifying the Constitution, 85 *b*.
POLITICAL EXISTENCE, Right of, 7–69.
POLITICAL DOMAIN, 300.
POLITICAL PARTIES, (See PARTIES), 80, 151–154.
POLITICAL REVOLUTION, Right of, 88, 52, 57, 58.
POLITICAL SELF-PRESERVATION, 21.
POLITICAL SOVEREIGNTY (See SOVEREIGNTY), 11–16.
internal and external, 14, 15, 16, 136.
as internal, inalienable, 87 *a*, 94, 136, 150, 169.
as external=Common Consent, 11, 97, 126, 136.
source and nature of, 11, 70, 71, 91, 92, 101.

POLITICAL STATE, what is a, 18–20, 91–92.
various foundations of, 11–16.
POMEROY, John Norton, his Theory of the Constitution, 101–111, 133.
PREAMBLE to Constitution, 84, 108–110, 149.
how it originally stood and why changed, 109–110.
PRESS, Freedom of, 149.
RATIFICATIONS of the Constitution, 84–86.
RELIGION, free exercise of, 149.
REPUBLICANS, THE, 152–154.
RESERVED RIGHTS of the States, 134, 140, 149, 150, 164–172.
RESOLUTION AND LETTER of the Constitutional Convention, 83.
RESUMPTION of Political Sovereignty by the People, 39, 40, 52, 70.
REVOLUTION, AMERICAN, of 1776, History of, 38–51.
REVOLUTION, POLITICAL, Right of, 38, 52, 57–61.
RHODE ISLAND, her Colonial Government, 27.
her First Constitution, 27, 43.
her Ordinance of Ratification, 85 *n*.
SECESSION, Right of, 13.
refuted, 137, 150.
SELF-GOVERNMENT, Right of, defined, 11, 14, note to 16.
ceded by the People to their Rulers, 12, 171 to 180.
reserved by each Individual, 13.
by each State, 13.
partly ceded and partly reserved, 14.
as internal, inalienable, note to 16.
as external, determined by Common Consent, 16, 97.
SOUTH CAROLINA, Colonial Government of, 25, 26.
her Ordinance of Ratification, 85 *h*.
SOVEREIGN PARTIES to Constitution, 104, 105, 117, 120, 128.
SOVEREIGNTY (See SELF-GOVERNMENT,) natural, 69, 70, 91, 101.
political, source and nature of, 11, 70, 91, 101.
of Government, 12, 87 *a*, 87 *b*, 92, 140.
resumable by 'the People,' 39, 40, 52, 70, 150.
of 'the People,' 11, 93–96, 140, 164, 172.
of the States, 54–61, 91, 93–96, 133, 135, 150.
as internal, inalienable, 94, 135, 136, 164–172.
as external=Common Consent, 126, 127, 135, 137, 150.
STAMP ACT, of British Parliament, 33–34.
STATE, Civil, distinguished from Political, 91, 156, 165.
Political, definitions of, 18, 19.
distinguished from Nation, 20.
a means to a definite end, 38, 52.
the original warrant for its institution, 18.
STATE CONSTITUTIONS, establishment of, 43.
General Form of, 75–76.
nature of, 73–75.
STATE-RIGHTS DEMOCRATS, 153–154.

States, American, three kinds of, 156–165.
States, The, Revolutionary action of, 40–45.
necessary to our System, 121, 136, 172.
reserved Rights of, 134–140, 168–172.
State Sovereignty, 15, 54–61, 91, 93–96, 133, 134–135.
how far alienable, 16, 135.
ceded to U. S. in three cases only, 126, 127.
how affected by xivth xvth Amendments, 164–172.
Theory of, Federal, 134–138.
Imperial, 102, 129.
States United, The, Principle of, 14–16, 119, 141, 153.
changed into One State, 168.
Story, Justice, his Theory of the Constitution, 133.
Suffrage, control of, the test of Sovereignty, 94, 95, 97, 168.
universal or limited, 98.
universal, the Ruin of Republics, 99.
importance of regulations of, 95–99, 164–172.
under xivth and xvth Amendments, 164–172.
Supremacy Clause of the Constitution, 143–144.
Treason, note to 65.
Treaty of Peace with Great Britain, 51.
United States, The, what, 19, 91.
origin of the name, 50, note to 92.
changed into One State, 168.
Union, of the States, Principle of, 14–16, 111, 112, 119, 141, 153.
articles of, original, 50–51.
nature of, under the Art. of Confederation, 62–64.
under Constitution, 101–155.
may it be dissolved, 137.
Usurpation, a new and easy method of, 107.
danger of Legislative, 146 *a*.
danger of Federal, 87 *a*, 87 *b*, 149.
Virginia, Colonial Government of, 25.
Declaration of Independence by, 43, 57, 58.
her First Constitution, 57.
her Ordinance Ratifying the Constitution, 85 *k*.
Von Holst, Const. and Polit. Hist. U. S. note to 44, note to 102.
Voters, 91–98, 165–166, 171–180.
Webster, Daniel, his Theory of our Governments, 133, 140.

Lorenzo Sawyer

BP ABE FRp
Political and constitutional l
Stanford Law Library
3 6105 043 900 278